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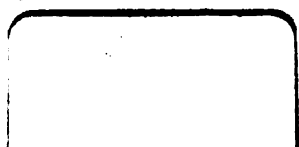
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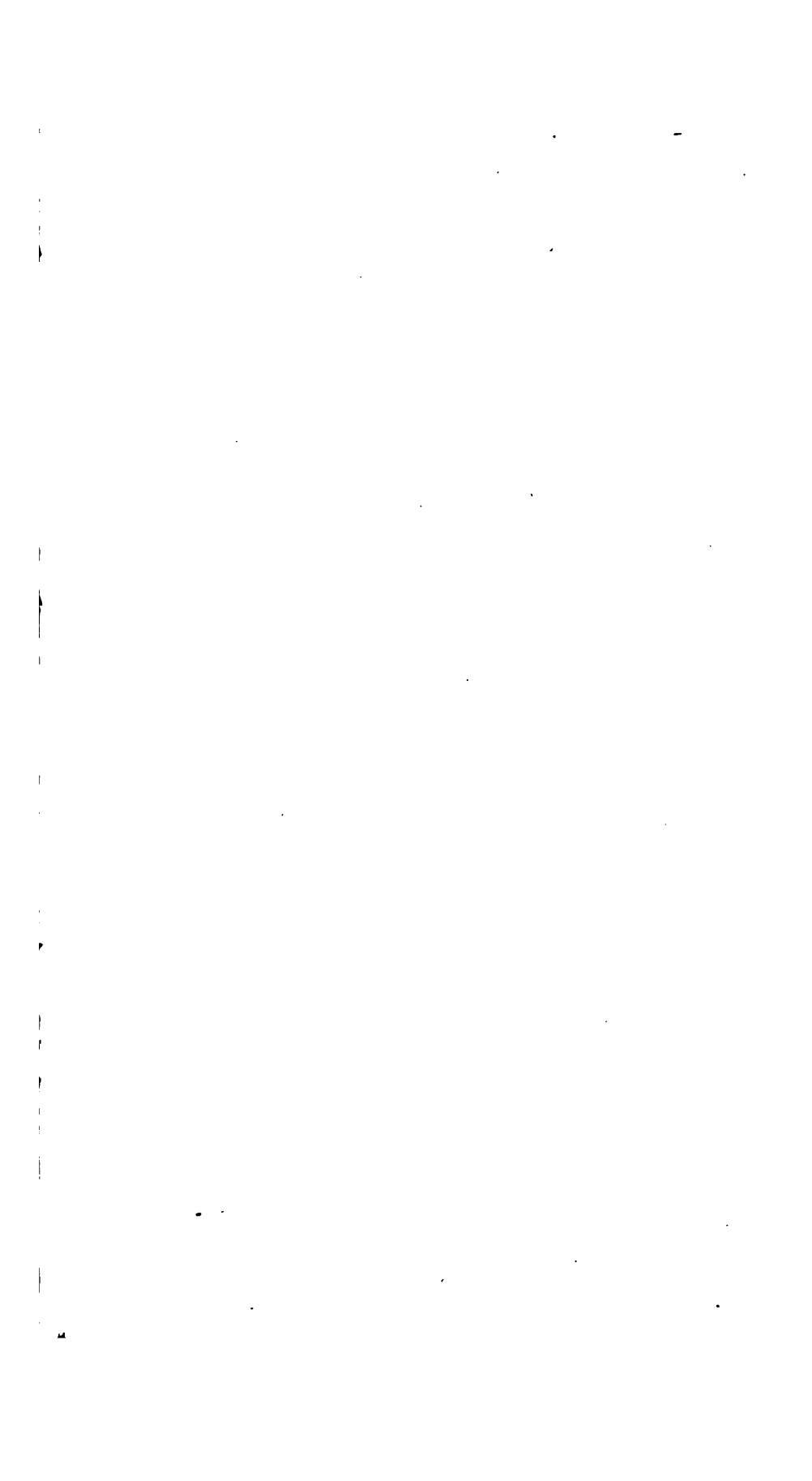
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THE
JOURNAL OF JURISPRUDENCE,
1858.

VOL. II.

EDINBURGH:

T. & T. CLARK, LAW BOOKSELLERS, GEORGE STREET.

GLASGOW: SMITH AND SON. ABERDEEN: WYLLIE AND SON.

LONDON: STEVENS AND NORTON.

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THE

JOURNAL OF JURISPRUDENCE.

MUTABLE LAW AND IMMUTABLE JUSTICE.

"ONCE justice always justice," is a maxim frequently in the mouth of lawyers, the truth of which it would be difficult to dispute. The reference to precedent is based upon it as a principle; what certain wise men in judicial ermine, or scarlet and blue, considered just a century or two ago, being, in virtue of it, just still. And hence the maxim, "Once justice always justice," becomes synonymous with a very different proposition, "Once law always law," the falsehood of which is very apparent. For, to the reflective reader of the histories of nations, few facts are more patent than the mutability of laws. Terrible and wise were the grey-bearded Druids in Britain nineteen centuries ago, with their Stonehenge, and oak temples of justice, and their criminal jurisprudence, which burned up scoundrels wholesale in wicker baskets, in a fashion considerably different from any now sanctioned by the Lord Chief Justice of England, or the Scotch Lords of Justiciary. And in these nineteen centuries how numberless the changes, how various the lawgivers,—Roman, Saxon, Norman, in succession! What was treason in one reign, and a passport to the scaffold, was patriotism, and a passport to royal favour, in the next. Opinions, for the promulgation of which judges recorded sentence of death, raised some of their successors to the bench. "Once law always law," is a proposition that will not stand, whether that law be the opinion of a judge or the edict of an emperor, unless in those rare cases where the judge has had the clear vision to see, the steady hand and the unfettered will to touch, some point in immutable justice. Caprice, fashion, ignorance, and expediency, which dictate laws through monarchs, mobs, and houses of Parliament, and even through judges, are the changeful creations of the changing ages, and almost as mutable as the dresses and the faces of fleeting generations; but justice sits afar, unchangeable, dimly seen, and often wrongly seen, through the earthly mists and vapours that rise to veil its throne from imperfect human sight, yet ever claiming the allegiance of those who have realised that, not to gratify sense, but to obey conscience and work the work of duty, is the high destiny of man.

Equitas sequitur legem, Equity moves in the direction of law, is another maxim received as true in England, in which we very much decline to believe. Carrying out the principle of law is not necessarily equity; for this cannot be when the law is not equitable. With all deference to English jurists, and Hobbes, the "Leviathan" among them, out of whose philosophy this maxim springs, it seems to us, that what they call equity is neither more nor less than logic, whose province it is to follow out principles to their legitimate conclusions. Instead of following law, equity would often take the opposite direction, and, according to any accurate idea of the relations of the two, law ought to be the follower, and always is when law is making progress,—law generally being far enough behind. Truer would it be to reverse the maxim into, *lex sequitur equitatem*, and not unwise to add, *Legis est equitatem sequi*. The closer law follows equity the better; and to strive after equity is the endeavour of every judge whose intellectual vision is not blinded by dusty, iniquitous traditions, and of every legislative Solon, who desires to bless his country with righteous laws. To do this, it is not necessary to be able to define equity or justice; for all men understand what justice is, but no man can adequately define it; that which we know best being least definable. For, as men see and feel sufficiently well for their bodily safety, and for the supply of their bodily wants, and as the wisest philosophers cannot tell what they see and feel, but must call the external somethings by empty names, such as "qualities of matter;" so all men, as the ground of their responsibility, and the very basis of their manhood, recognise by enlightened conscience or practical reason what justice is, while the very wisest philosophers cannot unfold its essence, or give any definition which has not more imperfections than merits.

But this universal recognition of justice is subject to limitations as to degree. In the mind of a Socrates, or Plato, or Leibnitz, it ascends to the godlike; in the mind of a Hottentot or Hindoo, it sinks towards the brute. But where it disappears altogether (if it ever do), the biped, though in human form, cannot to the eye of reason appear other than an irresponsible, dangerous, or, it may be, inoffensive brute. Moving upwards from the savage state, the conception of justice, like all other conceptions, intellectual and moral, alters and expands, changing at every stage in the progress of civilisation, from the notion that it is just and right to kill and eat the enemies of the tribe, to the aspiration,—

"Oh, when shall all men's good be each man's rule!"

—an aspiration after the unattainable in this erring, selfish, mortal state.

Of the influences that alter the human conception of justice from age to age, the chief is the growth of knowledge; in fact it comprehends all the rest. The morality and religion of man depend very much on his intelligence. "Oh Lord, teach me to know Thy law,"

is the prayer of the wise man and of universal mankind; for that law being known, and the certainty of the vengeance which follows its breach being understood, it will be obeyed. Thus it is that knowledge rules selfishness, and inclines it to justice, because it instructs selfishness that its purposes cannot be served by being unjust. According to Hobbes, it is this enlightened selfishness which brings men together into the commonwealth at first out of that fabled state of war, which philosophers before Plato had speculated upon, in order to obtain some measure of personal security.

Jura inventa metu injusti fateri necesse est.—HOR.

How man should ever learn to trust his fellow at all from the experiences of savage war, and how he should seek to revenge injury, and return evil for evil and good for good, is not explained by this selfish theory, nor by any theory which does not recognise a connate capacity for distinguishing right and wrong in man. "If I do him injury, he will injure me," is a conception that could never enter a mind that did not understand what injury or injustice is. It is a conception which has never yet entered the minds of tigers; and they have lived in a state of war rather longer than man. And why? Simply because no *experience* can teach justice to those who want the native faculty for recognising it. The experience of selfishness is thus exclusively acquisition of knowledge; and many are the unjust and irrational customs, once sanctioned by law, which it has abolished: among others, the ancient combat and the modern duel, the ordeal by fire or water, wholesale massacres, pillage of neutrals, and other iniquities and barbarities of war, the practice of judicial bribery in Britain, if not in other countries, according to which, law is sold to the highest bidder regardless of equity.

As knowledge grows, iniquitous customs die out. They are offensive to the enlightened conscience, and seem to be obstructive to the enlightened selfishness of man. For what is just is good for all, and what is unjust is in the end good for no one. As the arch enemy of superstition, knowledge, surely if slowly, abolishes those unjust laws and jurisdictions that owe their origin to superstitious beliefs. Our Scottish Solomon had much to do in the business of trying and burning witches, and to his royal mind no business seemed more important and necessary. But on this mighty matter of witchcraft the opinions of society have changed, and we can afford to pity or laugh at the mischievous credulity of James. Belief in the divine wisdom of kings was not very possible in Britain after the reign of this timid pedant, and belief in their divine right had a rude warning to quit in the execution of his son Charles, although it has been productive of injustice enough since that event. Now it has sunk to the same level in social faith as the divine right of policemen. All these fictitious divine rights are only for a season, because they are mere delusions, at variance with fact. Over Europe the divine right of popes was asserted in bulls, excommunications,

groans from the rack and from the secret cell, whence hope had fled,—a divine right which, to the eye of reason, began to appear peculiarly diabolic. And now from Northern Hindoostan we are made fully aware of the divine right of Brahmins to be priests, gentlemen, soldiers, murderers, ravishers, by a method of proclamation well calculated to abolish said divine right, which is one of the oldest superstitions extant on the face of the earth. Fortunately, in Britain we have not many divine rights, and these of a mild order. Though absurd, they are generally harmless or expedient; violent changes being dangerous in the body politic; but Gibbon, and a few radical enthusiasts of a sanguine temperament, entertain hopes that in a century or two law will put an end to the divine right of heirs of entail, and eldest sons to live in luxury, and see their brothers and sisters starving.

The justness of the laws of a state depend, in a great measure, upon the conscientiousness and enlightenment of its lawgivers. If they do not know the right, they cannot do it; if unconscientious, they *will* not, although they know. But generally ignorance, the essential condition of low intellect, and a low standard of personal rectitude, go together. It is impossible for a bad man to be very wise. Life scarcely affords leisure for wickedness and the acquisition of wisdom. It is equally impossible for a wise man to be very vile; for he has observed and noted, that vicious pleasure does not last long, and that remorse is a dear price to pay for it; and he has seen into the worthlessness of existence as an animal or a knave, very little wisdom being competent to lead to convictions of that sort. We may say, then, that defective knowledge has been the cause of most vicious laws; and a deference to what is supposed to be the wisdom of our ancestors, but which is in reality the want of it, absolute folly it may be, is the cause of their perpetuation. But knowledge alone does not alter laws, for the knowledge of the right does not always necessitate the doing of it. Knowledge directs, but it is want and misery that drive. Political economy had condemned the corn laws for many years; yet it was not science, but the hunger of Ireland, that abolished them. Therefore it happens that as knowledge lags behind true conceptions of justice, so the inertia of society, indifferent and comfortable, lags behind knowledge. Expediency, too, will not sanction every change simply because it is theoretically just; since changes in law are generally ruinous to individuals, and the old and understood is always more secure, though imperfect, than the new and strange. Old men dislike new ideas, and new customs, and new laws. Hence the conservative tendency of judicious age, which would rather keep to the tried and the tolerable than pursue the best. Hence the slowness with which law moves after equity.

Among the masses of society there is a kind of friction, so to speak. Ignorant, unwieldy, inert, selfish, it stirs with difficulty. That it should overtake justice is hopeless. Omniscience did not give the

Jews equitable laws, "because of the hardness of their hearts." It has been the lot of wiser men since Ulysses to

" Mete and dole
Unequal laws among a savage race."

Every lawgiver has been hampered by the material upon which he had to work. Slaves of appetite will follow their own devices. And, indeed, so far as we can see, the hope of perfect justice is as Utopian as the perpetual motion. Physical friction ever has, and ever will, defeat the one; and social friction, that adhesive tendency of self to all things desirable, ever will defeat the other.

The iniquities which the legislator cannot remove, hamper the judge. He strives after equity, fettered by laws and precedents which the rules of his calling forbid him to break rudely, but allow him to stretch a little, and slip aside, when absolutely oppressive and moderately loose. He is not, like the legislator, guided in the least by the clamours of the mob; his premises are generally given him, and his logic may be as perfect as his reasoning faculty can make it; but all his conceptions of equity are controlled by law. For him the maxim which we dispute, *Equitas sequitur legem*, has a meaning and a force. It means, his ideas of equity must yield to his logical deductions from settled and existing law. When some of his premises are not matters of law, but of fact, then the fresh difficulty of ascertaining truth arises to perplex him. His ignorance of fact he exchanges for presumptions of law or nice balancing of evidence. In balancing evidence, he is doing his best; but in creating presumptions of law, he is sometimes furnishing excuses to ignorance, over-indolent to seek earnestly after certainty, even when it is attainable.

Still, with the highest human intellect, and the purest motives in legislator and judge, perfect justice is never attained. The jurist fails in reaching perfect justice, as the poet or painter fails in reaching perfect beauty. Words cannot express the poet's thought; canvass will not carry the painter's visions. The realised of man always falls short of his ideal. Not in creeds and confessions do we find a perfect religion; not in books of philosophy do we find truth; not in the opinions of jurists or the codes of nations do we find perfect immutable justice. One is all-just only, and He is all-wise.

Some visionaries have ventured to hope for a reign of justice upon earth; but how any rational being can expect the sin and selfishness that interpenetrates human society to be quite removed, without a miracle, is a matter of surprise to us. Out of the golden age, or the primeval paradise, there will always be injustice, oppression, and misery. No human prudence, or science, or disinterestedness, can banish what is as much part of the system of things as darkness and inclement weather. A very favourite basis for this air-castle of universal justice has been the maxim, that "all men are equal," which is as false as any maxim can be. Between

the beggar's child, born under a hedge, and the rich man's, born under splendid bed-curtains and ornamental ceiling, there is a very considerable and obvious inequality; but between the child gifted with the *capacities* of genius, wherever born, and the infant dunce, there is a far greater inequality. Again, one is born with a constitution which will last seventy years, another with a constitution that will not survive childhood. Since circumstances and constitutions, which determine the individual, are so various, it will hardly do to mass healthy and unhealthy, clever and foolish, saving and spend-thrift, together, and say, "All men are equal." The truth is, they are unequal in every respect: unlike in face, in stature, in gait, in voice, in mind; not a bone of one skeleton would fit another without modification, nor a thought of one mind. Equality and identity exist nowhere in nature, and cannot, for the deepest law of nature is change, which defaces the characteristics of the one as the other approaches its likeness. Hence the French, in their great revolution of 1789, had much trouble and little success in pursuing their philosophical motto, the child of atheism and madness, "Liberty, Fraternity, and Equality." All they attained was the liberty to use the guillotine, the fraternity of the headsman's sack, and the equality of the grave. Similar revolutions since have not helped them a hair's breadth nearer the unattainable. Anarchy has been crushed by despotism, and even burst out like a fire under the tyrant's feet. It is the same through all history, and over the whole world. The balance of equality is never attained. It trembles with every wind of heaven—now this way, now that. Society is as unstable as water; and the wave, which was rolling crested to the stars the one moment, is the next paving the hollow abyss.

Some intensely practical lawyer may be asking, "What is the use of all this tedious disquisition to me?" And, indeed, to satisfy some men on that score would be very difficult. Our object in what we have written was to stimulate thought,—to note the fact well, that human laws are not for all time, but only for a few generations; and to note the other fact, that, as civilisation advances, they are superseded by closer approximations to abstract justice. That law has always been changing, and ever will, until the millennium at soonest, is a matter worth our friend the practical lawyer's while to know; and few matters of knowledge could delight him more, we fancy. His work is never likely to fail, unless club-law return.

Since the distance between equity and law is so great, and the barriers in the way of union so strong and various, numberless notions of expediency, vested interests, selfish ramparts of classes and of corporations, and mountains of ignorance overshadowing men's minds, which have sufficient darkness of their own, law must long continue mutable—we say, must ever continue so. For, as the past has altered its laws, so will the future alter the laws of the present and its own. The circumstances of human life, and the tendencies of human thought, will vary, as they have varied, from age to age.

As the past has been, so will the future be—alike in mutability. Vain have the wishes of nations and of rulers been hitherto, that their laws should endure for ever. The laws of Solon have lost their meaning, and the debased Greeks have had many lawgivers not sages, since they stooped and fell from their high estate; no orator now, with Cicero, lauds the fragments of the twelve tables as the perfection of human wisdom; for eighteen centuries the Mosaic law has been obeyed by wandering Hebrews, only for the sake of bigotry or pride; and the Medes, who boasted the unchangeableness of their laws, are themselves abolished. Yet, amid all this decadence of human laws, the laws which regulate the physical world have not altered. River and planet keeps its course, day follows night, the seasons come in their order: there is lightning in the summer cloud, and snow in the thick, dim breath of winter. Birth and death, and the seven ages between, compose the little drama of existence, as of yore. The laws of nature never change. In the beginning, Omniscience enacted them for all time. And we doubt not, though we cannot prove, that similar laws were enacted for moral and social existence. That code is the code of immutable justice. Happy the nations whose sages have read here a line and there a line of it. Their wisdom will bless many generations, and survive after they have passed from earth. Tribonian, Gaius, Papinian, Paul, Modestinus, and Ulpian, shall rule the world when the sceptre has dropped from the nerveless grasp of licentious tyrant Rome. For with eager eye they deciphered parts of the world-old tablets into a jurisprudence which is imperishable. But, assuredly, under all selfish, unjust human laws, burns the divine law of change, restless as Etna's molten entrails; and the parchments of kings and emperors, bearing enactments intended for a long future, each inscribed *Esto perpetua*, shrivel up over its lava flood, and drop into it, black unnoticeable ashes.

ON THE LAW OF FRAUD IN CONTRACTS.

(Continued from p. 524 of Vol. I.)

THERE are certain contracts in which an unusual amount of confidence is held to be reposed in the one party by the other, and to the validity of which entire candour and strict good faith are essential. The general characteristics of the contracts now referred to are, that the facts are known exclusively, or almost exclusively, to one of the parties; that they are contracts of speculation and indemnity, in which one party agrees to undertake a certain risk arising in a certain state of circumstances within the view of the parties contracting. If the facts within the knowledge of the party who desires thus to secure himself from risk, be different from what

he represents them to be, then the real risk is not the same thing as the risk formally undertaken, the whole blame is on the party misrepresenting, and the party undertaking the risk has no means of examination, or of satisfying himself whether the real facts correspond with the facts as stated or not.

The most important of such contracts is the contract of insurance; the fullest disclosure is, in this contract, the implied, and frequently the expressed, condition of the validity of the policy. It would be quite out of place to mention here this extensive subject and important contract, except as the most prominent example of that sort of contract which implies duty of disclosure. Policies of insurance of life, and against fire, are in general made as a customary precaution, without reference to anything else than the ordinary risks of daily life. But, in contracts of maritime insurance, the risks are more various, many and the most minute circumstances may alter them. In such cases, questions about the legal obligation of disclosure most frequently occur. And without entering on the slightest examination of so extensive a subject, there can be no doubt that the fullest and most exact disclosure has always been held essential to the validity of the policy. But only those circumstances which actually go to modify the risk, can form the elements of the insurer's calculations; opinions of others, however they might actually bias his mind, and however they may operate as an inducement to the owner to insure, are not facts increasing or diminishing the risk, and need not be told; but except opinions, expectations, and the like, everything which bears, *or which might possibly bear*, on the risk, which would have a legitimate influence on the judgment of the insurer, must be disclosed; and the general and easily applied maxim is, that whatever is an inducement to the owner to insure, is, to the same degree, an inducement to the insurer to decline the insurance, or at least to demand a higher premium. The contract of insurance is, therefore, an exception, to some extent, to the general rule, that the motives of a party in entering a contract need never be stated. Of course, in reductions of such policies, if there be non-disclosure, it is not necessary to aver fraud.

The contract of cautionary, or surety, is the other principal contract in which a duty of disclosure peculiarly arises. It is, in several respects, analogous to the contract of maritime insurance: both are contracts of indemnity against risks; the one against the hazards arising from perils of sea, the other against the hazards arising from the chances and casualties of mercantile affairs. But between the two there is this essential difference: in insurance, what a man insures is his own vessel, whose destination, and sufficiency, and time of sailing, and length of voyage, and all the particulars that vary maritime risks, are known to himself, and in his own power; whereas a creditor knows, and, as a general rule, must be presumed to know, little or nothing of his debtor, and has no control over his conduct. The character and general conduct of the debtor are

more likely to be known to one who is willing to become his cautioner. Hence it is only in special circumstances, and when the creditor and surety are brought into direct contact, that the duty of disclosure arises between them.

Between the debtor and his cautioner there must be the fullest disclosure; but then the surety is bound, not to the debtor, but to the creditor, and he cannot defend himself against the creditor by alleging the fraudulent misrepresentation or concealment of the debtor. With that the creditor has nothing to do, unless he knows of the concealment, and adopts or abets it; or knows of the misrepresentation, and does not contradict it. It then becomes his own misrepresentation, and the cautioner will be free, on the ground that, though the principal may not be bound to inquire or know what is transacted between the debtor and the cautioner, yet that the contract is emphatically one of good faith which any fraud will vitiate.

When a bank or any employers demand and obtain security for the actings of their agents, it is their duty to disclose any circumstances known to them materially affecting the risk. By employing an agent, they accredit him as trustworthy, and are bound to state to a cautioner any circumstances which go to contradict this presumption, which they, by their own actings, have raised. This principle was established in regard to banks in the ruling case of *Smith* (1829, 7 S. 243; and 3 Dow, 270). And the rule was extended to employers generally, in the case of *Railton* (1844, 6 D. 536; and 3 Bell, App. 56).

In *Smith's* case, the Directors of the Bank of Scotland were aware that one of their agents was considerably in arrear; and they wrote him, that in respect of the increase of business at his branch, and of the death of certain of his cautioners, it would be necessary for him to obtain additional cautioners. On receiving this letter, the agent did get additional cautioners, who, by the terms of their bond, became liable for past as well as future debts. It was not held necessary to enter upon the question, whether this transaction was fraudulent on the part of the bank or not. It was treated as not a case of fraud; but it was held, that the bank were bound in law to disclose the liabilities of their agent, and that, because they had not done so, the cautioners were free. "If a body of men," said Lord Eldon, "employing a number of agents, find one whom they have reason to suppose not trustworthy—one who most likely owes them large sums of money, or who they may have reason to suppose owes them large sums of money, and call upon that man to give sureties, both for his past and future dealings, thereby holding him out as a person trustworthy, when they know, or have strong ground for suspecting, that he is not so,—that would not bind the sureties."—(*Smith*, 3 Dow, 272.)

In *Railton's* case, the same principles were applied to the case of

a merchant obtaining security for his agent, and not disclosing circumstances connected with the agency which made the cautionary obligation more than usually hazardous. In this case, it was endeavoured to be maintained that the non-disclosure proved no fraud; that before the cautioner could be freed, "industrious concealment, and not only silence, required to be proved against the creditor." But the decision fully settled the principle, that silence, and silence by itself, amounts to legal fraud when there is a duty of disclosure.

A creditor, however, as already stated, is not under the same obligation of disclosure. A bank, for example, when requiring caution for a cash account, has nothing to do with the other debts of the debtor. If they are debts to the bank, there is, on the contrary, a professional duty of concealment. So when a bank, to which a party was considerably indebted, required caution for a cash credit proposed to be granted in the party's favour, and the cautioners were not informed either by the bank or by the debtor of the previous debts, and, when the security was obtained, the whole of the cash credit was drawn and applied in liquidation of the debt; it was held—(1.) that there was no duty on the part of the bank to disclose the previous debt; (2.) that the bank had no duty, indeed no right, to prevent the party from drawing the full amount of his cash credit when he chose; and (3.) no concern with the application of the money drawn. Had it appeared, however, as in the special circumstances of the case it did not appear, that the true object of the bank was to obtain a security for the debt, and that the cash credit was only a pretence, it could hardly have been held that the transaction was not in breach of the good faith implied in cautionary obligations. For although a creditor, in such circumstances, is entitled to discharge himself of all concern about the manner in which his debtor obtains security, yet the cases sufficiently prove that, if he interferes personally, he must act with strict good faith, and will be as much bound to full disclosure as the debtor himself.—(*Royal Bank of Scotland*, 1844, 6 D. 1418; *Stone v. Compton*, 5 Bing. N. C. 142; *Peacock v. Bishop*, 5 Barn. and Cressw. 605.)

A duty of disclosure frequently arises from the relations of the parties contracting, in consequence either of the mutual confidence presumed to exist between the parties, or of the inequality of position of the parties, arising from some influence or advantage in point of position of the one over the other, or from both these causes combined.

In many transactions it is necessary to repose great confidence in the good faith and favourable dispositions of others; in other cases, such confidence arises from the intimacy of near or family relationship; dishonesty, and consequent distrust, would be destructive of the whole social benefits of such relationships. Although, therefore, the law does not aim at promoting mutual trust between contracting parties in contracts generally, it always protects confidence when

warrantably bestowed, and discourages, as much as possible, all approach to dishonesty in circumstances in which fraud is so easy, the temptations to it often so great, and its consequences so injurious to society.

Mr Justice Story gives the following enumeration of those relations of parties in which, according to the law in England and America, peculiar good faith is required between the parties. The relations he enumerates were those between "client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and *cestui qui* trust, executors or administrators and creditors, legatees or distributees, appointer and appointee under powers, and partners and part owners."

As the reasons for which good faith is held essential to contracts between parties in such relations are, in most cases, of general application, like good faith would, no doubt, be required in similar relations in Scotland, although in England the law of fraud generally, and the law which makes fraud partially dependent on the relations of parties, appears to be more extensively applied, and seems to cover more classes of cases, than in the law of Scotland. For instance, the greater number of the large class of cases in which contracts are dealt with in England on the principles of constructive fraud, are dealt with in Scotland on other principles, without the aid of the fiction of a constructive fraud; and such contracts are considered null or valid according as they conflict with morality, with public policy, or with the intention of statutes, or not.

Thus, too, it is difficult to say that there is in Scotland any principle of peculiar moral obligation which governs the relations and transactions of ancestor and heir. Pactions *de hereditate viventis*, though disapproved of in England as frauds on the ancestor, are quite legal in Scotland; yet the law of approbate and reprobate on the one hand, and of death-bed on the other, may not be without reference to such considerations. Although, no doubt, duty of disclosure arises between landlord and tenant, to the definite extent to which special confidence is implied, and, as a matter of fact, necessarily exists between them, namely, the extent to which confidence is always reposed when one man delivers his property into the custody of another, there does not seem to be, in Scotland, any peculiar moral obligation between the two in general transactions.

Between trustee and beneficiary, and between curator and ward, the *bona fides* essential is of the strictest possible sort. In these cases, all reasons concur in requiring complete *bona fides*, and full disclosure in all transactions. The utmost confidence is necessarily and actually reposed, and the greatest influence is exercised by the one party over the other. The rules of our law, in regard to such transactions, are preventive as much as remedial; and, to a great extent, incapacitate the parties from contracting. The duties of

trustees constitute, however, a very large and well defined branch of law, and cannot be considered here. Even after the expiry of the curator's office, he and his ward are not for some time on an equal footing, and contracts between them shortly after the expiry of the office will be strictly examined; but if such contracts seem fair, on the whole, they will be sustained.—(French, 1699, M. 4958; Monymusk, 1635, M. 4256.)

Between agent and client the duty of full disclosure and *bona fides* has always been held to be peculiarly stringent; the trust reposed is entire, the opportunities for influence, and the facilities for fraud, are very great. Our law has, therefore, shown extreme anxiety to maintain the purity of the legal profession; purchases by an agent of law-suits, or of property, the title to which is being litigated, pactions between agent and client, *de quota litis*, are unlawful. Bonds granted in the way of donation by a client to an agent, while that relationship subsists, seem not to be binding; where there is room for suspicion that an agent has taken an unfair advantage of his position—as by making overcharges—he must prove his *bona fides*, the presumption, in this case, is for fraud; and the heir of the client is entitled to challenge the agent's accounts, though they have been passed and admitted by the client himself.—(Maxwell, 1735, M. 4874; Taylor, 1824, 2 Sh. Ap. 254.)

A father and his son or daughter are not on an equal footing; and if bargains between them appear unequal, and in favour of the father, the presumption that the father has used the facilities he had for influencing the judgment of his son or daughter, and for enforcing the deed, will aid the latter in a reduction on fraud.—(Ewen, 1830, 4 W. and S. 346; Fraser, 1834, 13 S. 703.)

So there is an established presumption, that donations and deeds between husband and wife have been granted and executed under an influence incapacitating the parties for a deliberate and unbiassed consideration of their rights; and, therefore, they are revocable. Marriage contracts are undoubtedly *uberrimæ fidei*; and, where it is possible, relief will be given against the fraud of either spouse, or of his or her relatives, relating to and in contemplation of the marriage. But redress from fraud in marriage contracts is not always, or is seldom, possible, because the parties cannot be placed in the position in which they stood antecedent to the fraud, since it is impossible to reduce the marriage.—(Hoggs, 1749, M. 4862; Lisk, 1785, M. App. *voce* Fraud, No. 7; Angus, 1758, M. 5488.)

Under this head may be noticed deeds granted and contracts entered into under the pressure of poverty and difficult circumstances. The plea of fraud and extortion seems relevant either to modify a contract or to reduce it. The deed, in cases of extortion (the pressure of circumstances being proved or admitted), has been held of itself to prove the fraud; but the party reducing a deed on this ground, must pay the money he got for it, on the principle that

he who seeks equity must render it.—(Ewen 1830, 4 S. 346; Ersk. 4, 1, 27.)

While the law does not protect a man against his own rashness, ignorance, idleness, or mere folly, not amounting to mental imbecility, it affords protection to those who, from permanent, temporary, or casual weakness of mind, are unable to protect themselves. In such cases, slight proof of fraud will be required, and general averments of circumvention—a term implying something less definite and less susceptible of being reduced to specific statements of fact than positive fraud—will be sufficient.

(*To be continued.*)

ON SMALL DEBT JURISDICTION.

THE imperfections of civil jurisprudence range themselves in two classes. The justice administered is either incomplete and uncertain, or dilatory and expensive; and perfection in the one particular involves more or less imperfection in the other. Being thus compelled to make a compromise between the two, it is obvious that a system founded on the one principle, may, up to a certain point, be most conducive to the interests of effectual justice; while, beyond it, this result is no longer possible. Thus, in all suits where the subject-matter is of small value, the saving of time and expense is an absolute essential, because there can be no justice where a poor man is kept out of his rights, who cannot afford the delay; and it is rendered equally impossible where, in familiar language, the case is “eaten up” by costs. The poverty of a suitor is not necessarily measured by the value of the suit; but justice, to be effectual, must always be obtainable at a cost bearing no disproportion to the value of the subject. Accordingly, we find that, however grave and numerous are the objections to the quality of the justice so administered, almost every system has made provision for the disposal, in a manner more or less summary, of all causes in which the right in dispute is under a certain arbitrary amount.

The distinction is even recognised in sacred writ. We read in the 18th chapter of Exodus, that Jethro, the father-in-law of Moses, counselled the Jewish lawgiver to “provide out of all the people able men, such as fear God, men of truth, hating covetousness; and place such over them, to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens. And let them judge the people *at all seasons*: and it shall be, that every *great matter* they shall bring unto thee, but every *small matter* they shall judge: so shall it be easier for thyself, and they shall bear the burden with thee.” Moses adopted the wise counsel of Jethro; and the sacred record adds, “Moses chose able men; and they judged the people *at all seasons*: the *hard causes* they brought unto Moses,

but *every small matter* they judged themselves." Here undoubtedly is the earliest authentic record of a *Small Debt Jurisdiction*.¹

In all countries there appears to have been some such division of judicial establishments. The Romans had *magistratus majores ordinarii* and *minores ordinarii*. The *prætor* had an ordinary and a summary jurisdiction; and as to the latter, it is recorded in books of authority, that "in matters of less importance, he judged and passed sentence without form, at any time, or in any place, sitting or walking, and then he was said *cognoscere interloqui, discutere e vel de plano, vel ex æquo loco non e tribunali aut ex superiore loco*."² In like manner, the *prætor urbanus et peregrinus* administered justice only in private or lesser cases. The *prætor*, when asked by the parties, appointed a *judez*, who decided both on fact and law, but "only in such cases as were easy and of *small importance*." Causes of greater importance were decided in the ordinary tribunals of *recuperatores* or *centumviri*.

In the ancient law of England there were the courts *Piepoudres*, held at fairs and markets. According to one opinion, they got this equivocal name because of the dusty feet of the rustic suitors; others suppose that the term was so applied, because justice was administered as speedily as dust fell from the feet of the wayfaring suitor. Be that as it may, such courts were early recognised in market towns; and the *Tolbooth* had its origin in the detention of the parties who refused compliance with the summary decree to pay the market tolls or dues, and other awards of the steward of the market, who was supreme judge under this expeditious system.

Oliver Cromwell established or confirmed Baronial Courts for all claims which did not exceed 40s. These courts were saved from the abolition clauses of the Jurisdiction Act, 20 Geo. II., c. 43, and still exist. In like manner, magistrates of royal burghs exercised a similar jurisdiction to the same extent, known frequently under the equivocal name of *Courts of Conscience*, to denote the re-

¹ It is worthy of notice that in this judicial arrangement we have the origin of the subdivision of territory into counties, and, as in England, even the minute subdivisions of *hundreds* and *tythings*. It is also not to be overlooked, that neither in the supreme nor inferior courts of the Jewish Theocracy was any vacation permitted; "*but at all seasons*" were the people to have justice administered in matters small as well as great.

Nor were Circuit Courts unknown to the judiciary of Israel; for we read, in the 7th chapter of the 1st Book of Samuel, that "Samuel judged Israel all the days of his life. And he went (or, as in the original, *he circuited*) from year to year in circuit to Bethel, and Gilgal, and Mizpeh, and judged Israel in all those places." It is remarkable that we have here *three circuit towns* for a Jewish Justice Ayre, the exact number which has long been observed in Scotland. We have heard that an eccentric old clergyman chose the above cited as his text for a sermon to the judges at a circuit town, and that an eccentric old judge remarked, that the text was provokingly silent as to whether Samuel was accompanied with trumpeters, who are deemed so essential to the judicial dignity of the present day.

² Hence the origin of the term *de plano*—done on the *level*, or at the instant.

jection of all legal principles, and the supremacy of conscience as the sole standard of justice. This jurisdiction was founded solely on consuetude.—(Mabon, 17th Nov. 1836.)

Justices of peace had a civil jurisdiction in cases of servants' wages under the Act 1661. In Edinburgh, and some other counties, justices had for time immemorial exercised a jurisdiction to the extent of 40 pounds Scots, or L.3, 6s. 8d. *Justices of peace in Scotland* first, in 1795, received a statutory small debt jurisdiction, to the extent of L.3, 6s. 8d., by the Act 35 Geo. III., c. 123, which was limited to five years, but was extended to L.5 in 1800, by the Act 39 and 40 Geo. III., c. 46. This jurisdiction was greatly improved by the Acts 6 Geo. IV., c. 48 (1825), amended by 12 and 13 Vict., c. 34 (1849), which together form the code of small debt jurisdiction before the justices of the peace.

It was remarkable that, previous to 1825, sheriffs possessed no summary small debt jurisdiction, and debts of the smallest amount had to be prosecuted, litigated, and recovered, with all the formalities attendant on those of greatest amount.

The first Sheriff's Small Debt Act was 6 Geo. IV., c. 24, which was carried through Parliament by Mr Home Drummond, then member for Stirlingshire, to whom Law Reform is so greatly indebted for its earliest essays. This Act was afterwards extended, under the same auspices, in 1829, by the statute 11 Geo. IV., c. 55; and, finally, the existing statute, chiefly the result of the labours of the late Mr Robert Wallace, the member for Greenock, after much opposition and many failures, was passed on 12th July 1837. It is the 1 Vict., c. 41. By this last statute, the jurisdiction was made to embrace almost every claim and dispute within the maximum, and Circuit Small Debt Courts were first made imperative.¹

In all these statutes, the limit of the jurisdiction was fixed at the singular fractional sum of L.8, 6s. 8d. But this is explained by the fact, that this sum in ancient Scotch money was equivalent to 100 pounds, which formed the point of demarcation in Scotch law between matters of great and small importance, regulating, amongst other things, the rules of evidence. This distinction, however, in progress of time, became of so small practical importance, that the late Sheriff Courts Act, 16 and 17 Vict., c. 80, s. 26 (1853), without in any way interfering with the machinery of the Act, extended the small debt jurisdiction to L.12, with power to parties, by written consent, to have causes to any amount tried in this summary mode,—a liberty which in some counties has been considerably used, and would be more so, were not the mode in which business is now disposed of in many respects so objectionable.

The truth is, the justice administered in a Small Debt Court

¹ The Jurisdiction Act contemplated circuit courts to be held by sheriffs, and previous Small Debt Acts *authorised* them; but it is a curious fact, that, with the exception of the Small Debt Court at Kincardine, in connection with the Sheriff Court at Dunblane, there was no such circuit court held until 1837.

has now in many cases ceased to be worthy of the name. The rapidity necessary is quite incompatible, either with a correct perception by the judge of the facts of a case, or a careful consideration of the law to be applied. Despatch is gained to an extraordinary degree; but it is gained at the expense of every other consideration—especially of those qualities which secure for our courts of justice the respect of the people, and deepen their confidence in the laws under which they live. Strictly speaking, the smallness of the subject-matter of a case should have no influence on its merits. Justice, abstractly, is the same, in whatever case administered, and however applied. Her scales are so nicely adjusted, that they measure with equal precision the smallest parcel or the heaviest weight. Nor should it be forgotten that value is relative, and that a penny to a poor man may be of as much value as a pound to his richer neighbour. It is small solace to the suitor who has been unjustly deprived of money, to be told, that if he has had an injustice, he has at least obtained it quickly and cheaply. We do not say some machinery should be devised for making litigation about small sums either dilatory or expensive; but is no reform possible without sacrificing these features in the procedure? Can we not obtain a better article at the same money?¹

It will be acknowledged that the great mass of the business of the country is now transacted in our Small Debt Courts; and it is a great mistake to suppose that the cases there brought and decided, are between parties in the lower walks of society, or that they involve no principles of law, and in their consequences do not vitally affect individuals, and collectively the great masses of society.

The amount of business transacted in Small Debt Courts may be discovered by consulting the various returns made to Parliament from time to time. We take the following from the Report of Mr Burton on "Arrestment of Wages," dated in 1854, since which time the numbers have greatly increased by the increase of the value from L.8, 6s. 8d., to L.12. In the year 1851, there were decided in the Sheriffs' Small Debt Courts of Scotland 52,183 cases. In Glasgow alone, there were in 1852 as many as 15,842 in the Sheriff Court, and 10,750 in the Court of the Justices there. Of the 15,842 cases in the Sheriff Court, as many as 12,083 were decrees in absence, proving the propriety of the rule to be subsequently purposed to have these at once pronounced by the calling over the roll in the first instance.

We are most opposed to the recognition of any such thing in our law as "*Small Debt Justice*," where principles are accepted or rejected as rules of judgment, the very opposite of those which are the

¹ Lord Brougham has remarked, that "all the establishments formed by our ancestors, and supported by their descendants, were invented, and were mainly and principally maintained, in order that justice might be duly administered between man and man." The obligation of the sovereign under the Magna Charta is, "We shall sell, delay, or deny justice to none."

rationes decidendi in the ordinary courts of law. Indeed, in the same court on different days, and perhaps on the very same day, the very opposite rules of judgment are recognised and enforced. It is the *quality* and not the *quantity* of justice which ought to be aimed at,—not the haste of administration, but the reasonable despatch of justice, which should be the grand object and boast of the judges of our courts.

We cannot subscribe to the *dictum* of a lately deceased judge, who, on hearing at Circuit an appeal from a Sheriff's Small Debt Court, remarked that litigants in that court must not expect the polished ashler, but only the rough rubble work of law. But the error rests perhaps in the Supreme Court often refining the polish so much, as to neglect the substance. Rough rubble is still good, solid mason-work; and what is complained of is, that the rapid decisions of small debt tribunals cannot be ranked under any known description of law or justice, be it polished or be it plain.

Mr Hutcheson, in his treatise on the Office of a Justice of the Peace, observes, "Nothing can more directly tend to bring the institution into discredit and neglect, than any idea that the judges, under the Small Debt Act, are not under the same obligation with other judges to decide questions of fact according to the proof of the fact, and questions of relevancy or law according to the nature of the right;" or, "though cases are decided more cheaply and expeditiously, more suitably to the smallness of the cause, as well as more beneficially for all concerned, still the thing to be decided, whether by this court or the judge ordinary, cannot be different." To the same effect, Lord Cockburn, with his characteristic sound sense, observed, "The statute directs that the justices are to judge as shall appear to them agreeable to equity and a good conscience; which means that they are not to lose their senses in legal punctilios, but to decide like rational men."—(4th July 1850, Flowerden.)

We now proceed to the object we had chiefly in view, namely, to state some of the existing and acknowledged defects in our present system of small debt jurisdiction, and the appropriate remedies.

According to the present system there exists no limit to the number of cases which may be given out, and set down for hearing on any court-day. In this the judge has no *title* to interfere, and the clerk has the opposite of any *interest* to propose a restriction of the business of what to him is by far the most lucrative department of his office. In this way, in some courts it has been known that 500 and 600 cases, involving several thousand pounds, have been set down for one day for one irresponsible judge. It has been with feelings of something like disgust, we have heard sheriffs boasting of the number of cases despatched in a certain limited time, at the

rate, it may be, of one to the minute. The boast was analogous to a race against time. We wonder whether the delight was shared in by the litigants whose interests were thus so rapidly and irretrievably settled.¹ When the first Small Debt Act came into operation, we knew one sheriff who got the mastery of his rolls by *de plano* remitting every opposed claim to the ordinary action roll; and another adopted the easy plan of remitting every such case to a sheriff-clerk depute, who at his leisure examined the case and reported for a fee, and his report was at once adopted by the court without the trouble of hearing parties or witnesses. By a misunderstanding of the 17th and 33d sections of the Sheriffs Small Debt Act, the roll is read right through from beginning to end. The provision in this section is obviously for the purpose only of preventing cases being *improperly* taken out of their order, to the prejudice of other parties. A case often occurs early on the roll, to do justice to which may require an hour or more, and, by a foolish adherence to the letter of the law, the whole roll, with the waiters on for justice, are thus stayed. For the sake of two parties, several hundreds, whose time is their money, are kept shut up in a dense and ill-aired mob, waiting to obtain, it may be, a decree in absence, which, when once obtained, may not have been worth the waiting for. In the Registration Courts under the Reform Acts, unopposed claims are first taken up and disposed of, before those opposed are called on. Although it would have been well there had been express provisions in the Small Debt Act to the same effect, yet there is nothing in the Act or law opposed to the practice already so beneficially adopted in some courts, namely, to prohibit the clerk to issue beyond a certain number of cases for any court-day, with the exception of contingent claims; and secondly, to call the roll, in the first instance, once through, to the effect of giving decrees in absence or on confession, and craving to pay by instalments; and lastly, to have a separate court-day for continued causes. In this way the sheriff at once perceives the amount of *real* business to be overtaken, and has not his nerves kept at full tension with some fearful array of figures still behind, knowing not whether they are mere myths to appear and disappear, or whether they are actually to be contested by the parties. The sheriff, relieved of the presence and often the fragrance of the multitude with which his court is crowded, and seeing at once before him his work for the day, could deliberately take up every case in its turn; parties could calculate more accurately when their respective cases would be called; and a great saving of public time effected.

England was almost a total stranger to local judicature till, in 1847, the County Courts were established on the model of the Scotch Sheriff Courts. Their jurisdiction has been now greatly

¹ A chief Justice of England was once facetiously said "to rush through his cause list like a rhinoceros through a sugar plantation."

extended ; and the system modified, by the experience which is so readily acquired in a country so densely peopled, with interests so vast and multiform, and with legal business so extensive and varied. From the procedure of these courts, in their existing efficiency, many a useful hint may be taken. The results of experience acquired under such favourable circumstances, are at least worthy of patient examination, when admitted defects in our own system are found to require the application of some remedy.¹

Now, with respect to the evil to which we have just adverted, we find one important regulation in the English County Courts which might well be adopted in our Small Debt Courts. There a debtor may, by calling at the clerk's office within a certain time, sign a confession of judgment, and so decree is at once entered up, and the names of the parties to that cause are not called in public court. No such provision exists in our courts ; and, therefore, under the strict letter of the Act, where a summons is once taken out, however rashly, and though the claim be settled before the court, yet the clerk, under the penalty of 40s., must post up the whole names of the parties on the walls of the court-house an hour before the time of meeting, and keep it up during the time of its sitting, and shall audibly, himself or an officer (generally both join in discordant tones), call the causes on the roll in their order.

This is a species of pillory which may occasion great injury to the feelings, and, it may be, the credit of innocent and deserving parties ; and a rule similar to the provision in the English County Courts Act would be most advisable.

Our present system is also objectionable, from the total exclusion of law agents, and the almost complete denial of all review of the judgments of Small Debt Courts. The only one totally irresponsible man in this country is a small debt judge. He knows his decisions are not liable to review—the audience before which he exercises his functions are ignorant of law. A strong moral restraint is derived from the presence of an intelligent bar ; but the small debt statutes ignore all such salutary checks. The Justices of Peace Act, 6 Geo. IV., cap. 48, sect. 5, declares, that “no procurator or solicitor, or any person practising the law, shall be allowed to appear or plead for parties ;” and, in addition, all practising lawyers are excluded from the Commission of the Peace. The same exclusion is to be found in the Sheriff Small Debt Act, 1 Vict., c. 41, sect. 14, with the additional words, “without leave of the court upon special cause shown ; and such leave, and the cause thereof, shall in all cases be entered in the book of causes kept by the sheriff-clerk.” Moreover, all review is excluded. In the Justices Small Debt Act it

¹ The procedure of the English County Courts is regulated by 9 and 10 Vict., c. 95 ; 10 and 11 Vict., c. 102 ; 12 and 13 Vict., c. 101 ; 13 and 14 Vict., c. 61 ; 14 and 15 Vict., c. 52 ; 15 and 16 Vict., c. 54 ; and 19 and 20 Vict., c. 108.

is absolutely prohibited, unless by "an action of reduction in the Court of Session, on the ground of malice and oppression on the part of the Justices," and instituted within one year of the decree. So in the Sheriff's Small Debt Act there is a similar exclusion "of all review on any ground or reason whatever," "except by appeal to the Justiciary Circuits, on the ground of corruption or malice on the part of the sheriff, or on such deviations in point of form from the statutory enactments as the court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the sheriff."

The danger arising from this most mistaken policy is doubly aggravated by the absence of all professional assistance in the elucidation of facts and the application of law. The obvious tendency of such a state of things, is to introduce a looseness of judicial action in the best constituted minds. The "*Sic jubeo sic volo*" rule usurps the place of the "*Jus dicere*" of the magistrate.

Now let us consider the superior position of the judge of an English County Court. The jurisdiction of the County Court, originally limited to L.20, now extends to "any debt, damage, or demand not exceeding L.50." In all actions where the amount claimed exceeds L.5, it is lawful for the plaintiff or defendant to require a jury to be summoned to try the said action; and in all actions where the amount claimed does not exceed L.5, it is lawful for the judge, in his discretion, on the application of either of the parties, to order that such action be tried by a jury.—(8 and 9 Vict., c. 95, sect. 70.) The number of the jury is *five*, and the procedure is the same as at *nisi prius*. The evidence is led, parties are examined, the judge either sums up to the jury, or if there be no jury, he proceeds in a summary way to give judgment. In these proceedings, parties are assisted by counsel and attorneys, whose fees (regulated by scale) are allowed, on the certificate of the judge, as costs in the cause. The judgment is final; but the judge may, in his discretion, grant a new trial; and a right of appeal, in all cases above L.20, to any of the superior courts of common law, is given to a party "who is dissatisfied with the determination or direction of the judge in point of law, or upon the admission or rejection of evidence." The appeal is thus brought:—The appellant must, (1.) give notice, within ten days after judgment, to the opposite party or his attorney; and (2.) give security, to be approved by the registrar, for the costs of the appeal and the amount of the judgment. The appeal, under 13 and 14 Vict., c. 61, sect. 15, must be in the form of a case, agreed on by both parties or their attorneys; or, if they cannot agree, the judge, on being applied to, settles the case, and signs it. This statement is then printed and boxed, as we would say. The "case" merely states the facts and judge's determination (without reasons), and puts the

questions on which the opinion of the court is required.¹ The same form of appeal was adopted last session, for bringing the decisions of justices under review, in 20 and 21 Vict., c. 43, "An Act to improve the administration of the law, so far as respects summary proceedings before Justices of the Peace" in England and Ireland.

The checks afforded by the presence of lawyers in court, and the rules of procedure upon any abuse of an irresponsible jurisdiction, have in England worked most beneficially, and have contributed largely to the very high position which the local judicatures of that country already occupy in public estimation—a position far higher than our more ancient County Courts have ever reached.² The right of appeal is rarely taken advantage of; thereby showing that the right might with benefit be still further extended. It is the salutary influence which such a right has upon the judge (whether or not exercised), that is its chief advantage. The consciousness that his judgment is liable to animadversion in a supreme court, prevents all complaint, that the case is only half heard, or too hastily considered. If error is committed, it is done with at least due deliberation. Justice is not administered, as it were, by chance; and the judge is never carried away with the delusion, that *despatch* is the one sole and solitary object for which his court was instituted, and he appointed.

¹ The following is the form:—

Case on Appeal.

In the County Court of
(Seal)
On appeal to the Court of

holden at

Between A. B., Plaintiff,

AND

C. D., Defendant.

This is an action (*here state the cause of action and the facts*).

The question for the opinion of the Court of

is

First, (*Here state the question for the opinion of the Court*).

Signature of the Judge.

Broom's Co. C. Pr. 251.

² The English County Courts came into operation so late as 1847, and in ten years above 4,500,000 actions have been brought, and above 2,500,000 tried. In the words of Lord Brougham, in his recent letter to the Earl of Radnor, "These courts have performed a very great deal more of the judicial business of the country than all the supreme courts put together. The sums for which actions have been brought exceed fourteen millions of pounds, and judgments have been obtained upon trial, or money been paid into court, to the amount of much above eight millions, beside all that has been paid without bringing the cause into court. In one year, 1856—the last for which we have returns—this sum amounted to L.850,000, recovered by judgment, or paid into court. I think we may safely affirm, that they will find the task somewhat hopeless who would abolish this great branch of our judicatures, so much the most extensive, and without which the denial of all justice to those who cannot afford the expense of litigation would be renewed, and our judicial system once more condemned to labour under its greatest disgrace, from which it has of late years been thus fortunately relieved."

We submit, therefore, that the administration of justice in the Small Debt Court would be greatly improved by, 1st, the abolition of all restrictions on the use of professional aid by the suitors; and, 2d, the restoration of the right of appeal in matters of law. The courts should be thrown open to the regular practitioners in all causes of more than L.5 value, and below that sum, with leave of the court; and an appeal should lie either to the Circuit Court or the Court of Session, on a case prepared by the parties or the judge in the English form, containing the facts on which the opinion of the court is required in matters of law. As was shown in the number of this Journal for May, while an appeal of a limited kind still lies to the Circuit Court in all causes under L.12, sect. 22 of the 16 and 17 Vict., c. 80, excludes absolutely all review in cases between L.12 and L.25. This section has introduced a most anomalous and inexpedient state of things, and should therefore be immediately repealed. We ask review not so much as a right due to the suitor, but as a check upon the judge. Assisted by the regular practitioners, and subject to such wholesome control, there would be no further ground for refusing the wish which is understood to be entertained by the mercantile classes, that the small debt form of process should apply to all claims under L.25. But without some such checks, we cannot expect any further extension of small debt jurisdiction. On the contrary, unless some remedies be applied, these tribunals will continue to sink in public estimation.

In the English courts, the judge has power to commit in cases of fraud. This provision has been attended with most salutary benefits on commercial morality, and might surely be extended to the sheriffs. At present there is an absolute prohibition of imprisonment for all civil debts below L.8, 6s. 8d., and it matters not in what way the debt has been contracted, or what may be the true circumstances of the debtor. This, and the prohibition of arrestment of wages on the dependence, and so far as alimentary on a decree, render the great bulk of small debt decrees a mere mockery. The fraudulent and comparatively affluent debtor can laugh at his innocent, and it may be poorer creditor, who has obtained the privileges of the law without its power. In many cases, it is better for the creditor at once to write off his small debts as bad, than throw away good money in the vain pursuit of them, and have the annoyance of the small debt ordeal in addition.

There never was a more flagrant error than to suppose that a form of process procuring cheap and speedy, but certain and substantial justice, encourages a spirit of strife. The very reverse is the conclusion reached by all sound politicians. When the avenues to justice are tortuous and intricate, and the tribunals difficult of access, litigation grows with all the luxuriant confusion of an Indian jungle. But the very knowledge of the existence of a speedy, cheap, and effectual remedy, prevents much of wrong. The difficulty of obtaining justice deters an injured party from seeking redress, whilst the

same knowledge encourages the wrong-doer to commit and persist in his wrong. The rich, in such a state of matters, has an advantage over his poorer neighbour, who, denied the proper mode of redress, is too often led to seek easier and illegitimate modes of redressing himself. He takes the law into his own hands, where he finds she will not stretch a hand to help him in his time of need. In short, he may conclude, in the words of Mr Mill, "No proposition derived from political experience may be relied on more confidently than this, that the multiplication of law-suits is a proof of the bad administration of justice; that a perfect administration of justice would almost annihilate litigation; and that the attempt to reduce it by any other means, such as that of expense, is to hold out encouragement to plunderers, and to deny the protection of the law to the honest and just."¹

Review.

The Commercial Crisis—The New Joint Stock Companies Law.
 —The year opens obscured by the dark shadow which 1857 has left behind it. At no former period of commercial difficulty was the utter disorganisation of business more complete; on no occasion was the moral sense of the public so outraged by the disgraceful courses which have been disclosed in sundry proceedings in bankruptcy. The reckless trading—the domestic extravagance—the wholesale robbery—which, in many instances, have been admitted by the bankrupt, are indeed a painful illustration of the depth to which commercial morality is now sunk. Such cases may, however, be safely left to the native vigour of our criminal law, which mercantile men, without capital, should be made to know is elastic enough to overtake most kinds of fraud. Nay, it may even

¹ "To fine all claimants of justice, in the first instance, because a small unknown portion of them may perhaps deserve it, is surely absurd and unjust in the extreme, and no merely pecuniary consideration should induce a Government, bound to protect all its subjects, but especially those who most need protection, to uphold such a system for a day. As soon as the administration of justice is put upon such a footing, that all suits are promptly decided, those who are wronged effectually redressed, and wrong-doers suitably punished, litigation will be reduced within its necessary limits."—*Edinburgh Review*, July 1841.

In a similar spirit Lord John Russell observed, at the late meeting at Birmingham, "I have always looked with disfavour on the opinion, that it is expedient and desirable that justice should not be obtained except at some considerable price, because otherwise it would be impossible to curb litigation. My answer is, that by increasing the expense of obtaining justice you do not curb the spirit of litigation among the rich, while you not only curb but altogether quench the desire for justice among the poor."

be doubted whether, in the case of the corporation whose fall culminated our commercial disasters—the Western Bank—the lawyers of the country will not be called upon to settle many questions other than the mere liabilities of the bank to its creditors, and the rights of the shareholders *inter se*. The committee appointed to investigate the affairs of this once flourishing establishment, have reported that the management was “to a great extent of a dangerous and reckless description.” The manager is said to have given “credit to many parties who were worthless, and to have done so in defiance of remonstrances;” while the directors are blamed for a general laxity of supervision,—neglecting “those ordinary duties in the management of the company, which it is well known they all practise with so much fidelity and success in the prosecution of their own private affairs.” We have no opinion to offer as to whether either of these censures would be a good major in a criminal indictment; but in whatever way it may terminate, the issue of this national catastrophe will be awaited with the most anxious interest.

Meantime, the process of winding up—for all idea of resuscitation has long been hopelessly abandoned—will make Scotch lawyers more familiar with the important legislation of the last two years respecting joint stock companies. For this the country is chiefly indebted to Mr Robert Lowe, whose enlightened policy it has been, as Vice-President of the Board of Trade, to adapt as far as possible our commercial law to the practical wants of a complicated and progressive state of society. So long as commercial enterprise was confined to individuals, our old law of partnership was sufficient for all purposes; but when the enormous amount of capital requisite to the success of every undertaking introduced more extensively the principle of association, new rules became necessary, both to insure the interests of partners, and to make more effectual the rights of creditors. Till the 7 Will. IV., a joint stock company was like an ordinary trading firm. The law refused to recognise its corporate character; every shareholder could bind his copartners, and the consent of all was requisite in order to a dissolution. By the 7 Will. IV. and 1 Vict., c. 73, such an association could, by letters patent from the Crown, obtain all the privileges of a corporation; but as the right was conferred under the advice of the Board of Trade, the system was open to many objections, for which, a few years after, steps were taken to devise a remedy. In 1844, a Select Committee was appointed to investigate the law relating to joint stock companies; the result was the Joint Stock Companies Act of 1844—the 7 and 8 Vict., c. 110. The previous legislation was entirely of a permissive kind, the statutes affording certain privileges to companies applying for and procuring letters patent; but to put down gambling and speculative schemes, Parliament now interfered in a manner more compulsory. The above Act required that every company should be provisionally registered, after which it assumed a quasi corporate character; but till this was effected,

there could be no allotment of shares, or any of the proceedings taken, preliminary to obtaining letters patent, a charter, or Act of Parliament. Upon a certificate of complete registration which might be subsequently procured from the registrar, the company became incorporated, with various powers, but without any restriction on the responsibility of the members. The unlimited liability of every partner remained as a legitimate consequence of the common law doctrine, that every partner had an implied authority to bind his copartners in all matters relating to the business. The abolition of this rule was effected by the 18 and 19 Vict., c. 133—the Limited Liability Act of 1855. On compliance with the provisions of this Act, and the Act of 1844, the obligations of every shareholder might be limited to the amount of his share in every case in which the deed of settlement had been executed by twenty-five partners, holding three-fourths of the stock, provided 20 per cent. had been paid of the shares subscribed for. Such was the state of the law, when the whole subject came again to be reconsidered in 1856. The statute of that year (19 and 20 Vict., c. 47) was a consolidating measure; and this accordingly, with the statutes of the past session, now forms the existing code with respect to all joint stock companies.

The leading principle of this Act was, that incorporation, with or without limited liability, was a right, and not a privilege; therefore, while it was compulsory in requiring all associations with more than twenty members to be registered for the benefit of the public, and the facilitating of process against them, associations of from seven to twenty members might or might not be so registered,—the only result in the latter case being, that all the partners were individually responsible, and each liable to be sued by every creditor.

For the present we pass over the provisions regarding (1) the constitution and incorporation of a company; and (2) the management and administration thereof. The section of the statute more immediately interesting is Part III., relating to the winding up and dissolution of a company. It may be wound up either voluntarily or judicially,—judicially, under the following circumstances:—

(1.) Whenever the company, in general meeting, has passed a resolution requiring the company to be wound up by the Court.

(2.) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year.

(3.) Whenever the shareholders are reduced in number to less than seven.

(4.) Whenever the company is unable to pay its debts.

(5.) Whenever three-fourths of the capital of the company have been lost or become unavailable.

A company is deemed unable to pay its debts when it has failed for three weeks to satisfy a demand served at the office for a debt

exceeding L.50; or whenever there is evidence of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, having expired without payment being made. The proceedings for winding up by the Court begin by the presentation to the Court of Session of a petition, to be presented, if the company is insolvent, by a creditor or contributory,—if in any other circumstances, by a contributory only. Parties are heard, and the Court may order either that the company be wound up absolutely, or in the case of a petition by a creditor, that it be wound up conditionally on his debt not being paid in a given time. The procedure in such cases may be regulated by Act of Sederunt (sect. 97).

A company may be also wound up voluntarily whenever it comes to a natural termination, or whenever a resolution to that effect has been come to by three-fourths in number and value of the shareholders.

In either case, the duty of bringing the affairs of the moribund corporation to a close, is intrusted to a new class of officers, similar to trustees in bankruptcy, called liquidators: if the winding up is voluntary, they are appointed directly by the company; if judicially, they are named by the Court. Their duty generally is to realise the assets, make calls on the shareholders, and distribute the funds. They are to be remunerated by the payment of a salary or percentage, and they may appoint a law-agent, who is to be paid such remuneration, by way of fees or otherwise, as may be allowed by the Court.

The liabilities of a shareholder are determined by sections 61-6. A shareholder is liable for all the debts of the company, if limited to the extent only of the balance due upon his shares; but the responsibility continues though the shares may have been transferred one year prior to the winding up. Thus, suppose A has paid L.5 on a L.20 share, and transferred it to B, who paid a further call of L.5, and the company was wound up within a year of the transference by A, the Court may order the payment of the balance of L.10 from either or both. To free the first holder A of all liability, more than a year must have elapsed between the transference of his shares and the winding up. But by section 66, the transferee must indemnify the transferrer against "all calls, made or accrued, due on the shares transferred, subsequently to the transfer." If the liability of the company is not limited, the responsibility of the shareholders, besides being universal, extends over a period of three years prior to the winding up. Every person who has within that period ceased to be a shareholder, is liable in contribution, without any reference to the amount of calls remaining to be paid; but he is not liable for any debts contracted by the company after his connection with it ceased; and, as in the former case, the transferrer of shares has relief against the transferee for all existing and future debts of the company, in a degree proportioned to the shares transferred.

From this Act banking and insurance companies were altogether excluded. (Sect. 2.) This provision has been repealed by the 20 and 21 Vict., c. 49, and Banking Companies are now registered and registerable like any other trading corporations. Such registration is not to affect obligations previously incurred, but the machinery established by the Act of 1856, as amended by the Act of 1857 (20 and 21 Vict., c. 14), is now available for bringing the affairs of such corporations to a close.

English Bankrupts.—Certain of these masters of the mysteries of finance, dreading the ordeal of Basinghall Street, have recently attempted to avail themselves of the advantages of the Scotch law of Bankruptcy. Till lately the process was by no means formidable—the examinations were never published; no one was present save the sheriff, the bankrupt, and the agents; the proceeding took place in the sheriff's back parlour; and the whole affair was of the most quiet and formal description. The looseness of the practice in this matter was a clear contravention of the statute, which specially directs (sect. 87) that the examination shall be public, and shall take place in the court-house (although certainly, Schedule F interpolates, "or other place"). But when the newspapers discovered that these, and legal proceedings generally, were of a slightly more saleable character than the clerical twaddle talked at presbyteries and tea-meetings, an examination of a bankrupt assumed an importance which, save in theory, it never had before. The publicity now given has been of the very best service to the public, as the result of a recent remarkable case very clearly shows. The only advantage which the Scotch law offers to these parties, is the facility with which a discharge may be obtained where it is unopposed. The procedure is both simpler and cheaper than the English practice; but recent cases have shown that these advantages have been obtained without offering any cover to fraud, or an undue protection to the swindler. Though the Court grants sequestration on every petition which is *ex facie* regular, it reserves to itself the discretion of again recalling it, if that is deemed expedient in "the whole circumstances of the case." This discretion has already been exercised in the case of a well-known person of the name of Sleigh, who founded a jurisdiction here by making a tour in the Highlands during the shooting season, and whose only connection with this country (all his debts having been contracted in England), was a refined taste for the picturesque, and an inordinate love of our institutions. That accomplished person, Mr John Edward Stephens, bank manager, watchmaker, pipe manufacturer, timber merchant, invalid chair-maker, etc., etc., of Gothic Lodge, Twickenham, and Northumberland Street, Edinburgh, has been equally unfortunate in his experience of "the easy process of the Scotch courts." Having first fled from his English creditors, he was constrained, after only five days' trial, to flee from Mr George Young

and Mr Sheriff Hallard. We mention the case in order to point out to our English friends, that the Scotch law affords no shelter to these run-aways. Our practice is not a whit less lax than their own. The bankrupt remains at the mercy of his creditors and the Court; and if his losses are the result of causes other than misfortune, protection is at once refused, or suspended if already granted. While the primary object of his examination is to ascertain the precise state of his affairs, the amount of his liabilities and of his available assets, he is bound also to explain the causes of his difficulties; and the mode in which he is afterwards dealt with, is determined by the circumstance whether his conduct has been innocent, reckless, or criminal. In the latter case, sects. 97 and 162 of the statute provide for proceedings being at once taken against him, either by the trustee at the expense of the estate, or by the Lord Advocate on the information of the accountant in bankruptcy.

The Meeting of Parliament.—The proceedings of Parliament, during the recent brief session, being necessarily confined to the immediate question which rendered so early a meeting necessary, were entirely devoid of professional interest. The paragraph in the Queen's speech respecting the English law of real property, and the consolidation of the statutes, shows that the present administration is thoroughly alive to the importance of the amendment of the law; and though as yet we have had no official statement regarding the intentions of Government this year with respect to changes in the law of Scotland, we need no assurance that the Lord Advocate is as favourably disposed to this question as his English colleagues. Mr Dunlop, we are glad to see, promises to be as indefatigable as ever. He gave notice of his intention to introduce a bill to abolish the *jus deliberandi* of an heir, for a year after his ancestor's death, as to whether he will take up the succession. This rule, borrowed from the Roman law, is now altogether unnecessary, and indeed is rarely if ever taken advantage of, more especially as its whole object has practically been gained by the limitations of the 10 and 11 Vict., c. 47, upon the liabilities of representation. It is one of those useful unobtrusive reforms, which it appears to be the peculiar mission of Mr Dunlop to accomplish, and which by slow and gradual steps are rapidly adapting our system to the times in which we live. We are informed that a more important inroad on established usage is about to be attempted by the same able hand. Mr Dunlop is about to introduce a bill for the purpose of carrying out a favourite idea of Mr Gillespie Dickson, respecting the proof of foreign law. By this measure, the suggestions contained in a note at page 991 of Mr Dickson's second volume, will be made law:—

"The present mode of proving foreign law is objectionable, and admits of improvement whenever the point is one cognisable by the courts of England or Ireland. It may be a question in *apicibus juris*, on which different views would be entertained by the highest judicial authorities of the appropriate

tribunal after full debate ; and therefore to decide it on the opinions of counsel, not always the most eminent, given without hearing parties, and perhaps in the hurry of an extensive practice, must frequently cause injustice. Nor would the suggestion thrown out in the text remedy, although it might abate, the evil. Still more objectionable is the practice of examining counsel as witnesses ; for in them, as in all witnesses on matters of opinion, there is a strong tendency to support the side of the party who adduces them, instead of giving a *quasi* judicial opinion on the question. It frequently happens, too, that the best lawyers (for instance, Lord Chancellor Eldon) give their opinions with hesitation, while confidence and dogmatism often accompany superficial knowledge. Accordingly, the jury are apt to be misled where they can only decide on the apparent preponderance of opinion on either side. It is conceived that these evils would be remedied by allowing the Court of Session to send a case to the Supreme Court in England or Ireland, in which the question, if arising in either of these countries, would be adjudicated ; the decision of that court being obtained thereon, after hearing parties, as on a point of law reserved in a special verdict ; and a reciprocal course might be adopted for determining questions of Scotch law when arising in an English or Irish court. In this way the point would be decided deliberately by the appropriate tribunal, to which the parties probably looked when the transaction was entered into ; and the judgment could be applied by the court in which the action had to be raised in consequence of a collateral question of domicile.

"It may be added in support of these views, that under the former practice in this country, questions of foreign law used to be submitted to the judges of the appropriate court for written opinion, which was granted *ex comitate* on a recommendation from the court in which the suit arose.—*Paterson v. Hall*, 1620, M., 12,419 ; *Cunninghame v. Brown*, 1676, M., 12,323 ; *Ersk.*, 3. 2. 42 ; *Tait, Ev.*, 127."

A New Procedure Act.—Assuming that the Lord Advocate is as anxious a law-reformer as Sir Richard Bethell, we hope he will this session attempt the reform of our present system of process. The opinion is daily becoming more general, that we must have a GENERAL CONSOLIDATION ACT. Our law applicable to process pleading and practice, as it lies buried in forgotten Acts of Sederunt, and an infinite number of Acts of Parliament, and as these have been explained by a multitude of contradictory decisions, has at length reached that stage, that any further attempt to correct its defects by a mere piece of patchwork would only add to the existing confusion and uncertainty. We cannot in this country form a proper notion of the precise state of things which in England called the Common Law Procedure Act into being ; but certain we are that it would be one of the greatest triumphs of Mr Moncreiff's administration, were his name associated with a similar consolidating measure. His Bankruptcy Act is a fair specimen of what may in this manner be effected ; and were our existing rules of procedure digested into a code with the same free and liberal hand, which, displacing all that is objectionable, would at the same time adopt whatever amendments may be suggested by experience, or conveniently borrowed from English practice, we are satisfied that it would be one of the most salutary reforms of which our law is susceptible. No doubt there are persons who see no defects in our system. There are those who set their faces against every

innovation, on principle; and others who become enamoured of a system from long and constant practice under it. To these persons a rule, entirely arbitrary, comes by an easy process to appear perfectly natural and true. But there are many crazy parts of the old edifice, deserving no place in a new and reformed code. We must bring parties more rapidly to the real point at issue. If the question between them is one of law, let it be raised as such; if of fact, let it be determined; but let the one or other be clearly extracted from the case, and not blindly confounded as at present. We have no wish to see transplanted in this country the refined subtleties of English pleading; but it is very far from being necessary to do so, in order to incorporate some of their rules which would lead to a more complete separation of law and fact. What is the meaning of that plea which one meets with every day,—there are no “relevant grounds for the action,” or, “generally in the circumstances the suspension should be dismissed with expenses?” The question thus raised may be one either of fact or of law, or of both together. The history of certain recent cases which have been in Court for years, and are likely to remain for several more, are examples of the confusion, the delay, the expense, perhaps the ultimate miscarriage of justice, which are the consequence. The Scotch form of process is, we believe, perfectly sound in theory; but from the abuses which have in course of time sprung up, it is now universally condemned as the most unscientific ever invented. In the last volume of M^cQueen’s Reports, we find it abused by the law peers in the most unmeasured terms. In *Drew v. Dick*, 1855 (2 M^cQ. 113), the Lord Chancellor says, “What I have seen of Scotch law does not induce me to regard with any regret the superior strictness of English pleading.” Lord Brougham “concurs with his noble and learned friend that this lax course of pleading should still be persisted in by the Court below.” “It is *mala praxis*,” he says; “and this is not the first nor the tenth time that we have here complained of the laxity of these pleadings below.” Lord St Leonards also agrees in these observations as to the laxity of the Court of Session in regard to pleading. “It has arisen, in a great measure, I take it,” he adds, “from their allowing relevant and irrelevant defences, and from the mixture of law and equity which some persons are so anxious to introduce into this country. If they do so, I hope they will be kind enough to adopt some machinery which will prevent us falling into the errors which that combined system has led to in Scotland.” Now, surely a system condemned by such high authority ought not to be allowed to stand. Its defects are only so many impediments thrown in the way of the cheap and expeditious administration of justice. “Short injustice,” says the Persian proverb, “is better than tardy justice;” and if it is for the interest of the public to have as rapid, simple, and inexpensive procedure as possibly can be found, it is still more so for the advantage of the profession that the portals of justice should thus be thrown wide open. He is no true friend of the pro-

profession who obstructs the entrance of suitors by interposing obstacles at the threshold, and diminishes their number by fettering them with difficulties when once they are in. The popularity of the County and Sheriff Courts is an example of how completely identical are the interests of lawyer and client in this matter. The profession in Edinburgh needs new life, and a reform of our judicial system is the first step to be taken. At the same time, in all these questions let it ever be carefully remembered that every useful law reform has proceeded from lawyers themselves. A person without technical knowledge may sit in judgment on a system, balance the evidence for and against; but, having done so, his only cure is instant and entire abolition. He is unable to find a substitute for what he sets aside, still more to ingraft and incorporate that which would obviate the evil. We hope, therefore, that any rash measure forced through Parliament by some ignorant innovator, will be prevented by the Lord Advocate introducing a large and comprehensive measure such as we have suggested.

A Chinese View of Our Criminal Procedure.—In the case of *Hay v. Skene* (12 D., 1019), we find a characteristic observation by Lord Cockburn, “that *quoad* Scotland, and in reference to this question, China and England seem to be very much the same.” The question alluded to had, of course, nothing to do with our criminal practice; but in the recent number of the *London Law Magazine and Review*, we find an article on Miss Smith’s trial, which clearly shows that the shrewd judge’s dictum is, whenever an English lawyer condescends to put in contrast English and Scotch practice, of a much more sweeping application.

Our English—or rather let us say, on Lord Cockburn’s authority, our Celestial friend, does not for a moment think of testing our procedure by those eternal principles of justice and common sense which, with more or less reason, are supposed to underlie every system of jurisprudence. A French or other continental lawyer, mindful of his teaching in comparative legislation, would certainly do so, when speaking of a legal system different from his own; and so probably would a Scotch lawyer, under the influence of our old traditions of legal study at Utrecht and Leyden, and our still subsisting reverence for the law of Rome. But the Chinaman relies on a much simpler standard of judging. Whatever is Chinese is right; whatever is not Chinese is barbarous. For all times and all places he knows but one valid form of reasoning: *Sit pro ratione lex Sinensium*.

Remembering this, we must not suffer ourselves to be unduly depressed when we read the following passage,—

“We will not conceal our opinion at the outset, that the trial of Madeleine Smith is perhaps the most unsatisfactory one which we know of in modern times—unsatisfactory from the beginning to the end. The mode in which the evidence was sought for, produced, admitted, commented upon, and used; the

whole procedure, from the investigation by the police and magistrate to the summing up by the judge, exhibits to our [Chinese] minds a multitude of defects, which, we believe, our professional brethren in the north deplore, and, we trust, will ere long amend."

Then follows a quotation of Miss Smith's indictment in full. Our Scotch *acte d'accusation* is not perfect; possibly there is none perfect in any country—except China. It has at least this merit, that it must, on pain of nullity, accurately describe the offence, without a syllable of rhetoric, and give distinct notice of place and time. But our form of indictment is not Chinese: it is therefore "barbarous."

After the indictment, we find this paragraph,—

"As the procedure in criminal courts in Scotland does not admit of counsel opening his case by a statement of what he is going to prove, nor the circumstances under which the charge has been made, *the disadvantage exists of commencing the case by calling evidence; and so the charge against Miss Smith was first told through the witnesses.*"

This is quite true. We do, in practice, first place the indictment in the hands of the jury, and then proceed to call witnesses. But it would have been a satisfaction to know in what respect this practice of ours is contrary to the ends of justice. That it is not Chinese seems quite enough for its summary condemnation.

Our readers remember that it was made a great legal question at the trial, whether a pocket-diary of the deceased, containing entries corresponding in date with a most important period in the fearful history which was the subject of inquiry, should or should not go to the jury, as a piece of evidence for their consideration, along with the other evidence in the cause. One eminent judge was for receiving it; his opinion being afterwards approved by the whole legal profession in this country, with scarcely an exception. The decision of the majority of the Court was otherwise. The law of China is otherwise: the decision is therefore right. To say more were the merest waste of argument.

Words spoken by the deceased to a third party, and bearing directly on the subject-matter of inquiry, were in this case, as in that of Palmer, admitted in evidence. It was left for the jury, as judges of the facts, to say whether these words afforded any clue to the mystery of that strange death, or were, as the reviewer considers them, mere tea-table gossip. This was wrong; for the law of China, says our critic, absolutely rejects such evidence. Is not this conclusive? In his full knowledge of the respective duties of Scotch sheriffs and procurators-fiscal, our friend applauds and echoes a remark of the presiding judge on an incident in Miss Perry's examination. It appeared that during her precognition she had been very properly, as we think, reminded, in the fiscal's office, of a date which she had forgotten. It was not putting her in possession of a date which she had never known: it was restoring to her what she had known, but had forgotten. Here both the judge and his Chinese admirer fail to distinguish between assis-

tance fairly given to the recollections of an honest witness, and assistance improperly given to the inventions of an impostor.

We must not omit the following passage :—

“ There was, indeed, as the reader will have seen, abundance of difficulties in this case—partly, no doubt, arising from the circumstances which surrounded it ; but partly, as we have shown, from the unscientific and unsatisfactory character of the evidence, and the evils which naturally followed therefrom—one of the most serious of which, perhaps, is, that it induces the habit among those brought up under the Scotch system of jurisprudence to weigh loose inferences, to draw illogical conclusions, and to confound the value of a shrewd guess with satisfactory demonstration. We find also defects in the procedure which deserve notice. Thus the mode in which a prisoner's declaration is attained and used against him, is alien to (Chinese) notions of a fair criminal trial ; and the perusal of this trial will suggest many other points which are susceptible of judicial reform, but which we cannot discuss.”

Alas for us poor Scotch lawyers ! Why did we not learn law and logic in China ? It is to be hoped that the process is of a more liberalising tendency, than, from the criticism referred to, we are disposed to regard it. Seriously, we are at all times anxious to profit by the friendly counsels of our English brethren ; but when, in any variance of practice, it is asserted that they are all in the right, and we are all in the wrong, common courtesy at least requires that we should be told the reason that it is so.

Counsel and Agent.—For nearly ten years there has been a growing schism between the two branches of the profession in England, from which, in Scotland, we have hitherto been happily free ; but the progress of which may perhaps be all the more interesting to us on that account. The bar complains that the solicitors are encroaching on its domain, and that the competition is no longer fair—the amount of a barrister's business being dependent entirely on his personal influence with the client. Such are the sentiments entertained with respect to the mode in which business is distributed, that several members of the bar are even threatening to put the matter right by breaking through the time-honoured etiquette, and holding direct intercourse with the client. This rupture of existing distinctions must be deeply regretted by every friend of both branches of the profession. It is not very likely to occur, because every attempt to unite in the same person the duties of advocate and agent has been a total failure, especially in America, where the experiment has received the fullest trial. But the very fact that so bold an idea is being seriously entertained by several deserving and disappointed men, proves that the state of the profession in England is really of the most disheartening character. The following extracts from a very able article in the *Law Times*, may be worthy the attention of Scotch readers. The writer asserts (and we quite concur with him) that there is no falling off in the amount of business :—

“ Vast branches of new law, and the rapid extension of the County Court system, point to a time as at hand, if it has not already come, when a superior

class of advocates—in short, a completely formed local bar—will be needed to give due development to the machinery of local jurisdictions. Already, year by year, junior barristers are breaking off in clusters from the metropolitan courts, and forming the *nuclei* of provincial bars. All these facts point to the conclusion, that there neither is, nor is likely to be, any superabundance of competent barristers, and that the due absorption will not do more than meet the demand, even if the numbers should increase beyond the ratio and average of the rapid increase of the last twenty years."

At the same time, he is of opinion that, crowded as the ranks of the bar are, there is a remarkable deficiency of competent merit and ability, and the solicitor's difficulty is to discover the competent among the hosts of the incompetent.

"The numerical superabundance is apparent to all; the latent dearth is visible scarcely even to a few. The mysteries of learning throw an external veil alike over the scholar and the dunce. Their titles, their language, and their dress, identify them to the eye of the outer world. So that the jargon and the uniform be copied correctly, the busy, credulous laity take the rest on trust and at hazard. Also, when the plumage is the same, *ceteris imparibus*, impudence, sycophancy, and intrigue, are clearly the obvious and safest roads to advancement.

"The solicitor has a duty towards his client and also towards the public. In his former relation, he is bound to select not only competent but the ablest counsel that the proposed fee can obtain. As a fact, we believe that the large majority of solicitors act, or endeavour to act, on this principle; but undoubtedly there is a large minority which holds itself bound by no such rule, and of whom some fling their briefs, as a matter of course, to a brother, a cousin, a friend; or, it is to be feared—too, too often—to a few supple and dexterous sycophants, unscrupulous diplomatists, or convenient customers, of whom some are to be found not only disgracing the bar at this hour, but in a fair way of carrying off, in due time, its highest prizes. There are barristers of the day who, although junior men, are doing an amount of business, to which it is clear that their merits have not raised them. It would require a Thackeray or a Dickens to expose and chronicle the foul traffic by which that business has been made; to track from the outset of a career the greetings and salutations, the winning smiles, the soft and insinuating courtesies, the bewitching confidence, the patience under slight, rebuffs, and contumely, by which solicitors—for solicitors are men—are led at last to confer their briefs and their contempt simultaneously on the indomitable assailant."

The remedy the writer proposes for the existing unsatisfactory state of things has at least the merit of simplicity:—

"Give the back-bench men a trial. Let the solicitor take it as a high duty and privilege to bring unknown and unnoticed men out. There are men living who exult in the exclamation, 'I gave Follett—I gave Cockburn—I gave Thesiger, his first brief.' Well may he exult; for the giver has deserved well and nobly of his country. Try all who show the appearance or possibility of promise; let their future obscurity be their fault, and not their misfortune; and endure the indignation of brothers, cousins, and imbecile friends, who are ousted of their undeserved monopoly. Practised men must be had for important cases; but there is a large class of minor business through which a judicious solicitor may lead a young barrister upwards to usefulness and eminence, with benefit to the public and without harm to the client. Audacity and intrigue are sometimes without merit, and merit is sometimes without audacity and the power of intrigue. Above all, let not solicitors run away with the notion that a barrister is incompetent because he is silent; or that he is supercilious because he is reserved. Silence and reserve are the armour of a gentleman's self-respect, especially where even common civility is sometimes mistaken for artifice and adulation. The mass of barristers and solicitors are equally gentlemen, and

ought to be beyond the vulgar dangers of such misapprehensions; but still they exist. It is in the gradual extinction of the lamentable nepotism under which the profession is sinking, that we look for the regeneration of the latter, and the complete adjustment of the existing misunderstandings between the two branches of the profession."

Appointments.—The newspapers contain one or two paragraphs of interest. Mr William Hodges, of the Western Circuit, has been appointed Chief Justice of the Cape Colony. This promotion (says the *Law Times*) is the more gratifying, as it was bestowed entirely upon professional merit, and not from political obligations, which unfortunately govern too many of our judicial appointments. Mr Hodges is a member of the Inner Temple, and was called to the bar in 1833, and is author of a work on Railway Law. Lushington Phillips, barrister-at-law, of the Manchester and Salford sessions, has been appointed to be a puisne judge for the colony of Natal. Mr Serjeant Pigott, of the Oxford Circuit, is appointed Recorder of Hereford. Thomas Chown, Esq., is appointed to be a member of the Legislative Council of H.M. settlements in Gambia. Mr William Henry Pinder and Mr George Ross are appointed district police magistrates in the Bahama Islands. The Queen has been pleased to appoint Henry Maxwell Self, Esq., to be senior magistrate, and Victor Esnouf, Esq., to be junior magistrate, for the district of Port Louis, in the island of Mauritius. The Probate and Divorce Acts are to come into operation on the 11th of January. The judge appointed of the Court of Probate is to be also Judge Ordinary (*i.e.* working judge) of the Court of Divorce and Matrimonial Causes. The new judge is to take rank with the puisne judges of the superior courts of common law, and to receive a yearly salary of L.4000. On the first vacancy that makes such an arrangement possible, the three offices of Judge of the Probate Court, Judge Ordinary of the Matrimonial and Divorce Court, and Judge of the Admiralty Court, are to be united in the same functionary. When this occurs, the salary is to be raised to L.5000 a year.

Practice as to Petitions.—It is understood that this subject is at present under the consideration of a committee of the judges; but, meantime, the practice under the recent statute has been so far settled, that the following rules may be laid down for the guidance of practitioners:—1. The former practice of printing the petitions is continued. 2. They are to be addressed, not to the junior Lord Ordinary, but to the "Lords of Council and Session," as before. 3. Petitions presented before the Act came into operation, or in dependence, are to be carried out under the regulations then in force. 4. All applications for special powers by judicial factors appointed before the Act, or for exoneration of such factors, when presented subsequent to the date of the Act, are to be regarded as new applications, and to be brought before the junior Lord Ordinary. They, therefore, do not fall (as was erroneously stated in our last number)

under the exception of being incident to actions or causes presently in dependence. The recent statute makes no change in the practice respecting the poor's roll, or applications for admission as advocates, notaries, etc. Nor does it afford any solution of the difficulty which is now felt as to the appointment of a curator *bonis* to a minor *pubes* who can choose curators for himself—a point on which there has for some time been a conflict in the practice of the two Divisions. No absolute rule can yet be laid down on this point—the question remains in every case a matter for the discretion of the court; but, where a petition is presented on behalf of a family of young children—some under and some above pupillarity—it is obviously expedient to appoint the same individual curator *bonis* to the minors, and factor *loco tutoris* to the pupils; and this, it is understood, will be the rule acted on by the court. Some difficulty may be felt respecting applications of an incident nature by a trustee under the Bankruptcy Statute. It has been held that a petition for the discharge of a trustee appointed on a sequestrated estate, under the Act 54 Geo. III., should be presented to the Inner House, and not to the Lord Ordinary.—(Frame, *Pet.*, Dec. 18, 1857.) With respect to the procedure of judicial factors under the late Bankrupt Act, 19 and 20 Vict., cap. 79, an act of sederunt has been passed, which, it will be seen, is elsewhere printed.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

Mrs AGNES REID or WEBSTER v. JOHN ROBERTSON REID and PATRICK ROBERTSON REID.—Nov. 24.

Process—Competency of Action of Exhibition.

The late Mrs Robertson or Reid, of Glasgow, left two sons, the defenders, and two daughters, of whom the pursuer was one, bequeathing to them equally her whole estate. By subsequent codicil she bequeathed to her daughters certain subjects in Buchanan Street, as converted into "shares of Arcade property." The subjects had been purchased by her at a price of L.3800, of which the trustees of her father, Patrick Robertson, had advanced L.3200, out of a sum set apart on trust by Mr Robertson for behoof of his daughter, Mrs Robertson or Reid, in liferent, and her issue in fee; and the disposition of these subjects was taken in favour of Robertson's trustees, in these terms. In 1830, Mrs Robertson or Reid and her children granted a disposition to themselves in trust, for behoof of themselves *pro indiviso*, of certain heritable subjects acquired and converted by them into the Argyle Arcade. Mrs Reid died in 1833. Her father's trustees, in 1841, conveyed the subjects in Buchanan Street, then forming part of the Arcade, to her children, according to the shares and proportions in which they held the property of the Arcade under the mutual disposition. The defenders acted as factors and cashiers for the

pursuer, both individually and as one of her mother's representatives. They also acted as factors for the Arcade proprietors, and also for their mother's representatives. In 1841 the defenders, and the pursuer and her sister, executed a mutual discharge of all claims against each other. But no provision was made for the custody of the books, documents, and accounts. That deed of discharge was held by the defenders. In 1841 a disposition was executed by the pursuer, of same date with her marriage-contract; but, as alleged by her, outwith her husband's knowledge, conveying to the defenders and her sister, her whole share and interest in the Argyle Arcade, as at Whitsunday 1841, and with right to the rents from and after that term. It did not reach her right and interest in the books, accounts, and documents, relating to the property prior to 1841. She and her husband, and the marriage-contract trustees, now brought this action against the defenders, for exhibition of these books and documents, embracing the whole accounts of the intromissions of her mother's executors, and the defender's intromissions with the rents of the Arcade; also, the accounts referred to in the mutual discharge, and the agreements referred to in these accounts, "to the end that the pursuer may see and examine," "and procure the same to be registered, so far as capable of being registered," "or placed in safe custody or keeping," "or otherwise may obtain notarial copies for their behoof." *Defence*—The action is incompetent, there being no conclusions for reduction, or count and reckoning, or any other competent conclusion to sustain a demand for judicial exhibition. 2. No relevant ground for the demand. *Held*—(1.) That the action of exhibition was competent. *Stair*, 4, 31, 4; 4, 31, 1; *York*, 4, 1, 52-3; *Rothies v. Tutors of Buccleuch*, Dec. 9, 1661, M. 3060; *Paton v. Paton*, July, 7, 1668, M. 3963; *Kinaldy v. Paton*, Nov. 25, 1707; *Houston v. Shaw*, Jan. 25, 1715, M. 15,366. (2.) That there being no question at present as to the effect of the discharge in bar of a claim to account, the accident of the defenders having the custody of the documents to which it referred, would not create an exclusive right to them. (3.) That the pursuers had relevantly an averred interest to entitle them to the remedy sought by them.

BEGBIE, WISEMAN, AND COMPANY v. THOMAS BRUCE.—Nov. 24.

Lease—Property—Common Interest.

Begbie, Wiseman, and Company, leased the third and fourth flats of a tenement in Gordon Street, Glasgow, for business purposes, and enjoyed for several years, in common with the tenants of the two lower flats, the exclusive use of a principal or front stair, and relative back stair leading to the upper flats, and the exclusive use of a water-closet at the top of the principal stair. The tenants mutually arranged that only their clerks and customers should use the front stair-case as an access to their counting-house, and that their workers and porters should use the back stair-case as an access to the goods department. The proprietor built a new tenement on the adjoining area with commodious stair-cases, and proceeded to break out a door in the gable of the tenement in which Begbie, Wiseman, and Company were tenants, opposite to the landing at the fourth flat, and, for that purpose, to remove the water-closet, with the view of enabling the tenants of the new tenement to use the front stair on the old tenement as a thoroughfare for themselves and work people. Begbie, Wiseman, and Company, had a possessory right and interest in the existing mode of occupation of their stair-case and water-closet. They applied for interdict against the proprietor's operations. *Alexander*, Dec. 12, 1840; *Thomson*, June 8, 1822; *Ritchie*, June 20, 1833. *Defence*—The stair was formed, originally, to be a passage to the adjoining building; doors were then formed in the gable, which is a mean gable, and built up temporarily. The defender now proposes to open these, and not to remove, but only to shift the water-closet to an equally convenient position. *Held*—That during the currency of Begbie, Wiseman, and Company's lease, and as in a question with them, the proprietor was not entitled to invert or alter the state of possession by striking

out a door in the gable or removing the water-closet ; and interdict as craved granted.

WILLIAM MONCRIEFF (Sir John Menzies' Trustee) v. SIR ROBERT MENZIES and Others.—*Nov. 25.*

Trust—Construction—Clause—Directions to Accumulate.

The late Sir John Menzies died in 1800. He left a trust-disposition, the third purpose of which directed his trustees to convert the residue of his estate into cash, and invest the same in landed property in Scotland ; and further, "to place the produce of the said residue of my estate, when turned into cash, in the public funds, in their names, in trust, therein to remain and accumulate for the above purpose of purchasing lands in Scotland, to be entailed as land is, till a purchase, such as shall be considered eligible by my said trustees and executors, may offer." In 1806, the funds so invested were L.11,500. In 1817 the stock was sold out and produced L.23,554, which was deposited in the Royal Bank of Scotland. In 1829 the accumulated sum amounted to L.33,000. In the same year an estate was purchased for L.31,000, leaving a balance, which now amounted, with accumulations, to L.5314. The original trustees having died, the pursuer was appointed judicial factor on the estate. He brought this action of declarator, multiplepinding, and exoneration, which raised the question, whether he was entitled to retain the L.5314 for the purpose of purchasing lands in Scotland, or was bound to pay it over to the parties who otherwise would be admittedly in right to receive it, as forming part of the executry of the late Sir Neil Menzies, who succeeded the testator as heir of entail. The claimants pleaded, that according to the sound construction of the trust-deed, its purposes had been sufficiently fulfilled by the investment of the residue and its accumulation in an eligible landed estate in Scotland, at a price three times the amount of the original residue destined for that purpose. *Held*—That the trustees were not justified in postponing the purchase of an estate to so late a period as 1829 ; that, after payment of the purchase of that year, the balance should have been paid over to Sir Neil Menzies, the then heir in possession, and that at his death it became vested in his representatives, as part of his personal estate. Therefore claims sustained.

ALEXANDER PEARSON (Mrs Brown's Trustee) v. JOHN GARDNER and Others.—*Nov. 25.*

The late Mrs Brown died possessed of a house in Castle Street, Edinburgh, a villa at Trinity, an heritable bond, and certain moveable estate. The first purpose of her settlement was payment of her debts, and various legacies. Second, payment of a legacy of L.500 to Mr Pearson, the interest to be paid to Mrs Pearson out of the rents of the truster's heritable property, "while the same remains unsold," and the principal sum to be paid to Mr Pearson or his heirs out of the price of "the said heritable property when sold." It was the truster's wish that her heritable property should not be sold "immediately after my death, but shall be retained by my trustees until such time as the said heritable property is, in their opinion, likely to yield the highest price possible." She directed her trustees to apply the whole of the residue of her trust property and effects, in such way and manner as she might direct by any deed under her hand, failing which, then to make over the sum to her nearest heirs and representatives. The heritable property, "while unsold," was to be let on short leases, and the rents paid as she should direct, by a separate writing, and the trustees were empowered to lend out the proceeds of the estate on securities. Mrs Brown did not leave any separate deed or writings. The vidimus of her estate showed the probability of her debts and legacies being satisfied, without a sale of the house in Castle Street and villa at Trinity. This action of multiplepinding was therefore raised by the trustees to dispose of the residue. The question was, Whether, in so far as the trustee might not require to exercise the power of sale, the residue was to be treated

as heritable or moveable? Pleaded for the next of kin: The intention of the trustor was clearly the conversion of her estate, so as to carry it to her heirs in *mobilibus*; and, interpreting the trust-deed by that intention, the expressions in it truly amounted to a direction to sell. *Held*—That there being no express direction to sell, and the power to sell being qualified by the words "if necessary," it was simply a power which the trustees were entitled to exercise, so far as requisite, to pay the debts and special bequests of the testator, and that the residue of the trust-estate, so far as heritable, must remain impressed with the character of heritage.

The LORD ADVOCATE v. ALEXANDER MELVIN.—Nov. 27.

Excise—Statute—Construction—Process.

Information was filed against Alex. Melvin, a maltster, for violation of the statutes 7 and 8 Geo. IV., cap. 52, sec. 33, and 1 Vict., cap. 45, sec. 5, in respect "he did tread or force together in the couch frame, about ninety-seven bushels of corn making into malt;" the question being, Whether the malt was thrown into the couch frame in a way that enabled the maltster to pack a larger quantity in a smaller space than was allowed by the last-mentioned Act. The matter was appointed to be tried by jury. Application was then made by the defender for warrant to authorise certain experiments in regard to the casting of malt from couch frames, with a view to his defence. He stated that the couch referred to was originally filled from the steep according to the ordinary mode of casting. After the grain had lain for several hours, the officers of Inland Revenue caused the couch to be emptied and refilled, according to the system of casting in two cones—the merits of which was a *questio verata* between the trade and the Inland Revenue—and that the result of gauging thereafter having been to show an increase of 6 per cent. above the previous gauge (being 1 per cent. above the statutory allowance for increase by swelling, and for which penalties were now sued), the defender wished to make experiments as to the details and results of casting in cones, and of casting according to the usual mode of working. He intended to make the experiments in a distillery, for the reason that, as distillers do not pay duty on malt, there could be no risk of the revenue being affected by such operations. The Inland Revenue objected. They were willing that the defender should make experiments, but only in presence of their officers, and they offered to repeat any experiments made by themselves, in presence of the defender. They founded on the Act 18 and 10 Vict., cap. 94, as containing stringent provisions for malt in distilleries being under lock and key, and not to be interfered with without the presence of an officer, who, "during the time that any grain shall be upon the kiln, shall attend and admit the workmen into the kiln for the purpose of turning or stirring such grain." Pleaded for the defender, All the confidentiality of counsel is involved in such a course of experiments, which, to be effective, must be conducted outwith the presence of the pursuers. The rules of the revenue must submit to the rules of the Court, so far as necessary for the ends of justice. *Held*—That the question to be tried was not a general question, as between the trade and the Inland Revenue, but whether the defender had contravened the statute, and therefore, that it was not necessary, for the ends of justice, that the revenue laws should be interfered with in order to enable the defender to sift all the modes in which malt may be manipulated in breweries or distilleries.

JAMES RUSSELL and Others (Russell's Trustees) v. DAVID MUDIE.—Nov. 28.

Warrandice—Mails and Duties.

Russell's trustees were holders of a first heritable security over the lands of Balhousie, for L.3000. The bond was granted by David Millie, junior, as heritable proprietor, with consent of his father and mother as liferenters and joint obligants. The trustees entered into possession of the rents of the property under a decree of mails and duties, in 1853. David Landale, the holder of a postponed heritable security for L.1600, exposed the land for sale by public

roup, and David Mudie became the purchaser, with entry from Martinmas 1854. The articles of roup bore that the exposor should, out of the first end of the price, pay off the prior bond to Mr Russell. Payment was offered to his trustees, upon their granting assignation to their security, with warrandice from fact and deed; but intimation having been made to them that the mental capacity of the granter of their security was likely to be challenged, as well as his title as proprietor to grant the bond, they declined to grant an assignation with warrandice other than would be implied by the granting of a discharge, viz.,—warrandice that the sum of L.3000 was advanced by Mr Russell at the date of the heritable security, and that the same remained unpaid to the extent of the principal sum, at the date of the assignation. Mudie demanded warrandice from fact and deed, importing *debitum subesse*. A suspension and interdict was then applied for by Russell's trustees, against Mudie ploughing the ground or exercising any other possession till the bond be paid. Interdict was refused. But the note was passed. *Pleaded* for the trustees, warrandice from fact and deed implies warrandice of an existing debt, which there would not be if the bond were set aside. The trustees, being in possession, if allowed to remain undisturbed, might realise full payment in the life-time of the liferenters, whatever might become of the challenge applicable to Millie, junior. *Held*—That the trustees were not bound to grant an assignation with warrandice which might injure their position; and that warrandice from fact and deed importing *debitum subesse* might do so by involving them in claims of recourse, if their bond should be set aside. Therefore, that they were only bound to grant such warrandice as was implied in the granting of a discharge.

HENDERSON v. M'MILLAN and OTHERS.—Dec. 1.

Process—Reclaiming Note—Court of Session Act.

M'Millan and others obtained decrees in absence against Henderson. In a suspension at his instance the Lord Ordinary repelled two pleas taken by him—1. That the original action was incompetent as laid, in respect the pursuers had no joint interest in the sums sued for, and therefore could not be conjoined as pursuers in the same summons; and 2, that the separate interests of each of the pursuers was under L.25, and, therefore, that the original action was incompetent in the Court of Session. Henderson reclaimed, and when the note was called in the single bills, the respondents objected to the competency, under sect. 4 of the Court of Session Act, which provides that reclaiming notes against all interlocutors, except those disposing in whole or in part of the merits of the cause, shall be presented within ten days of their date. The pleas repelled here were preliminary, and therefore the reclaiming note ought to have been presented within ten days, whereas it had not been presented till the twenty-first day.—(Edinburgh, Perth, and Dundee Railway Co., July 13, 1852; Moir, Feb. 10, 1853.) *Replied*—This cause is not the original action but the *suspension*, a judgment in which is truly a judgment on the merits of the cause, although founded on a technical objection to the original action. *Objection* repelled, on the ground that the pleas in question truly affected the merits of the suspension, although they might have been preliminary in the original action.

JOHN HAY v. PETER BEATTIE.—Dec. 1.

Poor-Law Amendment Act, sect. 76—What is Continuous Residence?

Action at the instance of the City parish of Edinburgh, against the parish of Linlithgow and the parish of Canongate, for relief of a pauper. The question depended on whether the pauper's husband had acquired a residence in Edinburgh by reason of five years' continuous residence. From Whitsunday 1846 till Whitsunday 1848 the pauper and her husband resided in Edinburgh. In May 1848 they sold off their furniture, and went to Berwick, where the husband got employment. They remained there for some weeks. They then returned to Edinburgh, and lodged for several weeks in the parish of St Cuthbert's; returning thereafter to the City parish, and lodging there for

about five months. They then went to Leith, and took a house there; but after a few weeks they went to Linlithgow, and again, after a few weeks, returned to the parish of Edinburgh. During nine months the pauper and her husband had thus been absent twice for a period of about fourteen weeks each time. They resided thereafter continuously in Edinburgh, till the autumn of 1853, when the husband died, and the pauper was admitted into the workhouse. The parish of the husband's birth (Canongate) pleaded, that there must be an intention of abandonment of a parish in order to break off connection with it. Here the husband had only left Edinburgh on trial, with a view to better his condition, but failing to do so, he had finally elected to remain there. It was not necessary that residence be constant *de die in diem*. *Pleaded for Edinburgh*—The fact and animus of abandonment here both concurred. The sale of the furniture indicated the intention. The continuity of residence thus broken could not be restored by the pauper and her husband eventually returning to Edinburgh after several months' wandering. The Court *held*, though with difficulty, that the continuity of residence in Edinburgh was broken; but other questions remained to be disposed of before the parish liable for the pauper could be finally determined.

JAMES TURNER v. J. R. GRAY.—*Dec. 8.*

Agent and Principal—Liability for Writer's Account.

Action by a writer for payment of two accounts. *Defence*—Prescription. On a reference to oath, the defender deponed, that the first account had been incurred by his son, and that he, the defender, went with his son to the pursuer's office merely for the sake of giving explanations regarding his son's business—that the second account applied to an assignation in the pursuer's favour, sent to the defender by his son, then abroad—and that his actings in regard to it were for his son's behoof. *Pleaded for the pursuer*—These admitted facts and circumstances infer liability. Specific mandate is not necessary to establish employment. *Held*—That the oath was negative. The mere circumstance of going to a writer's office with a friend, would not so readily infer liability, as accompanying him to a merchant's warehouse.

JOHN CULLEN v. A. D. HUGHSON.—*Dec. 11.*

Diligence—Liability of a Disponsee and Assignee.

Hughson, as disponsee and assignee of Miss Barbara Rough, granted the following promissory note to John Cullen, W.S., who was conducting certain litigations on her behalf,—“Edinburgh, August 6, 1853, L.250 sterling, six months after date, I, as disponsee and assignee of Miss Barbara Rough, promise to pay to John Cullen, Esq., W.S., within the Royal Bank here, the sum of L.250 sterling, as per Mr Cullen's letter of this date for value. (Signed) Andrew D. Hughson, disponsee and assignee of Miss Barbara Rough.” The letter referred to, was as follows,—“Edinburgh, 6th August 1853, Rough v. Rough. In this case and in the relative matters connected therewith, it is understood and agreed that you are not liable to me personally, but only as assignee of Miss Barbara Rough, and to the extent of the funds belonging to her, and which may be realised under the deed of disposition and assignation, and I restrict my claim accordingly. It is agreed that I am preferable. With reference to this agreement, you have this day, as assignee foressaid, granted me a promissory note at six months for L.250. I am, etc. (Signed) John Cullen.” Cullen discounted the bill, which at its maturity was protested by the bank, and then taken up by Cullen, who registered the protest, and charged Hughson as assignee to pay within six days under pain of arrestment, poiding and imprisonment. Hughson suspended, on the ground that he was not personally liable—the promise to pay was contingent on the existence of funds, which must be proved by an ordinary action to be in his possession, before any diligence could be used. He had received no funds since the date of the note. *Pleaded, for the charger*—The suspender was personally liable, because by granting the note

he warranted to the charger that there would be funds available for payment thereof, and because he had failed in the due diligence incumbent on him as assignee, to recover funds. *Held*—That the note and letter did not constitute such a debt against Hughson as to infer personal liability, the promise only pointing at funds to be realised, and that the intention of the charger being evidently to make Hughson personally liable whether he had funds or not, and there being no averment that he had funds in his possession, the charge could not be sustained. Therefore the letters and charge suspended *simpliciter*.

MUIRHEAD AND CURATORS v. YOUNG'S TRUSTEES.—Dec. 16.

Mineral Lease—Landlord and Tenant.

A lease of minerals was granted by Mrs Muirhead, heiress of entail of Bredaholm, to William Young, his heirs, assignees, and sub-tenants, for a fixed annual payment of L.700, without any alternative of a tonnage rent or lordship. Mrs Muirhead was succeeded in the estates by the pursuer, who brought a reduction of the lease, with declaratory and petitory conclusions, on the ground that the lease, as granted, was *ultra vires* of the granter, and amounted to an alienation of the estate.—That under it the minerals might be exhausted by means of sub-lets, and the interest of the present and all succeeding heirs of entail, defeated; and also, on the ground that the mode of working adopted by the tenant, was an abuse of his powers, and therefore that the pursuer was entitled to L.20,000 of damages. These conclusions were expressed at great length. The Court, in June 1865, after voluminous proceedings repelled the reasons of reduction. They now repelled the declaratory conclusions, expressing opinions to the effect, that under such a lease, competently granted, an heir of entail was not entitled to have the workings restrained, and that, on general principle, he was entitled by himself or tenants, and by the application of capital, to work the minerals to exhaustion, but doubts were suggested whether this could be done by means of sub-letting, which it was not necessary for the present case to decide.

MELVILLE v. FLOCKHART AND OTHERS.—Dec. 19.

Poor—Settlement—Insanity.

A pauper, who had acquired a residential settlement in Glasgow, was removed in 1844 by his brother to Burntisland, and thence, by warrant of the sheriff, as a dangerous lunatic, to the Asylum of Montrose. Down to 1853, his own funds were sufficient to support him; but they then became exhausted; and the present action was raised by the Inspector of Montrose, to ascertain the parish which should be liable for his support.—*Pleaded* for Glasgow—Non-liability in respect the pauper had not resided there since 1844—For Aberdour, the parish of birth: non-liability in respect of residential settlement in Glasgow, or if that had been lost, in respect of another settlement acquired by the pauper in Montrose, where for five years he had resided in the asylum on his own funds. Montrose pleaded non-liability, in respect the pauper had not voluntarily resided there. *Held*—That Glasgow remained liable—the pauper having been residing there when he became insane. If mind or *animus* had nothing to do with the acquiring a settlement by residence, confinement in a prison might confer a residential settlement, which was absurd.

WATT v. HANNAH.—Dec. 19.

Poor—Settlement—Insanity.

M'Nish was boarded by his relations as insane from 1836 to 1846, in the parish of Inch. His birth-settlement was Stranraer. In 1846 he became a pauper; Stranraer then for some years defrayed the expense, and now brought this action to affix the liability upon the parish of Inch. *Held*—That the pauper never acquired a residential settlement in the parish of Inch, in respect that during his residence there he was insane and helpless, and unable to work; but opinions reserved, whether a person who is not quite insane can acquire or lose a residential settlement; and as to the case of an insane person travelling about with a large establishment, and emigrating from one parish to another.

SECOND DIVISION.

RIGHT HON. LORD SALTOUN *v.* PARK AND OTHERS.—Nov. 24.*Property—Sea-shore—Right to sea-ware.*

Lord Saltoun presented a petition to the Sheriff of Aberdeen, for interdict against the removal of sea-ware, shell sand, or stones, from the sea-beach *ex adverso* of the lands and barony of Philorth, in which he and his predecessors had been infeft on Crown charters for upwards of forty years; the charters do not specify the sea-shore as the boundary of the lands, but *de facto* they are so bounded. The respondents, who were tenants of land in the neighbourhood belonging to other proprietors, were not supported by their landlords, nor did they allege any right as proprietors or tenants of any dominant tenement to a right of servitude; but they averred that they, or some of them, and the public generally, had been in use to carry off sea-ware from the shores in question without interruption. The sheriff granted the interdict, the case was advocated, and conjoined with an action of declarator at Lord Saltoun's instance. *Held*—(Affirming judgment of Lord Ardmillan)—That Lord Saltoun had a right to the sea-shore *ex adverso* of his property, subject to the rights held by the Crown on behalf of the public; but which are only such as do not interfere with the proprietor's right to the profitable use of it, and that he has exclusive right to the sea-ware and shell sand.

Authorities.—Stair, B. ii., t. i., sec. 5; Innes *v.* Downie, May 27, 1807, Hume, p. 552; Macalister *v.* Campbell and Others, Feb. 7, 1837, xv. S. D., p. 490; Paterson *v.* The Marquis of Ailsa, March 11, 1846, viii. D., p. 752; Dyce *v.* Hay, July 10, 1849, xi. D., p. 1266.

SIMPSON *v.* FLEMING.—Nov. 24.*Caution—Arrestments—Stamp.*

Stewart sued Murray for a debt. Mrs Fleming, a creditor of Stewart's, used an arrestment which was put into the process against Murray. Simpson wrote a letter to Mrs Fleming's agent, agreeing to become security if the arrestments were loosed; and another letter containing this statement, "Stewart called on me with a letter from you, agreeing to withdraw the arrestments on condition of my becoming security. . . . I therefore wrote you, agreeing to become security. . . . If on this he has got the money, I shall be security." These letters were lodged in the process against Murray; he was decerned to pay Stewart L. 46, but found entitled to his expenses; the sum decerned for was applied by Murray's agents in payment, on a decree of forthcoming, to a creditor of Stewart's, of a debt secured by arrestment, of their own account of expenses, and in payment of a debt due to themselves on a bill by Stewart and his brother, which had been protested. In an action at Mrs Fleming's instance against Simpson, founding on his guarantee, and concluding for payment to her of the amount decerned for against Murray, the Sheriff-Substitute of Banff (Gordon) decerned in favour of the pursuer; the Sheriff (Currie), after ordering the obligation to be stamped, adhered, and this judgment Simpson brought under review by suspension. He pleaded, the obligation was conditional on the arrestments used by Mrs Fleming being withdrawn, and the money due by Murray paid to Stewart. Cautionary obligations were *strictissimi juris*, and the conditions on which the suspender's was granted not having been complied with, the respondent was not entitled to found upon it. The Court, adhering to the judgment of the Lord Ordinary (Benholm), repelled the reasons of suspension. Observed, that the respondent had done all she was bound to do; the arrestment was in effect loosed by lodging in the process against Murray the letter of guarantee, and the payment of the money to others for Stewart's behoof; she had no concern with the subsequent disposal of the funds.

The suspender cited—Taylor and Paterson *v.* Scouler, June 20, 1816, Hume, p. 106. Cited by the sheriff on the question of stamp—Gilkison *v.* Thomson, March 1, 1831, ix. S. and D., p. 520; Pirie's Representatives *v.* Smith's

Executrix, Feb. 28, 1833, ix. S. and D., p. 473; *Brierly v. Mackintosh*, June 1, 1843, v. D., p. 1100; *Taylor v. Hutchison*, Feb. 13, 1845, vii. D., p. 420; *Henderson and Macpherson v. Macpherson*, Feb. 7, 1855, xvii. D., p. 357.

FRASER v. BRUCE.—Nov. 25.

Loan—Proof—Stamp—Savings' Bank Act, 9 Geo. IV., c. 92—Sheriff Court.

In an action for repayment of a loan of L.40, the pursuer produced as evidence of payment an unstamped acknowledgment, on which were marked some jottings of interest; a savings' bank pass-book containing an account between the pursuer and the bank, showing an entry of a payment to the defender of L.40, which was signed by himself as the receiver of that sum from the bank; and an account tendered by the defender to the pursuer before the action was raised, in which the defender, though admitting receipt of the money, claimed credit for repayment in various small sums. The defender emitted an oath, in which he deponed to the verity of the entries in the account in his favour. The payment of the money to the defender was held to be proved, and that he had not proved either that he received it otherwise than as a loan for repayment. The jottings of interest on the unstamped acknowledgment was held competent evidence; though the acknowledgment itself, because containing a promise to repay, being a promissory note, was void for want of stamp. The defender's signature appended to the entry in the bank pass-book was also admitted as evidence, though unstamped. It was held that the oath of the defender, on account of informality in recording it, could not be looked at; it did not set forth who was present, the magistrate before whom, or the party at whose instance the oath was taken, and was not signed by the sheriff or commissioner, nor was there any minute of reference to oath.

COOK or HAGGART v. DUNCAN.—Dec. 2.

Liability of a Master for Injury to a Workman.

While executing some work at the defender's foundry, Haggart, a mason, was injured by the fall of a scaffold. The scaffold was erected under the orders of two foremen of the masons employed by the defender. The wood to be used was pointed out by the defender's general manager; it had formed part of a shed on the premises for about ten years; no precautions were used to test its strength. The accident was owing to the fracture of one of the cross pieces; and at the time there was no weight on the scaffold beyond what it was intended to bear. The defender was found liable in damages, which were modified to L.50, with interest since citation, and expenses.

Pursuer cited *Dixon v. Rankin*, Jan. 31, 1852, xiv. D., p. 420.

MACFARLANE v. THE MAGISTRATES OF EDINBURGH AND OTHERS.—Dec. 2.

Superior and Vassal.

A building stance in Edinburgh was feued to a vassal, who became bound to observe the conditions as to style of architecture, etc.; contained in certain agreements entered into between his superior and another proprietor: the conditions were referred to in the precept of seisin, and seisin thereon, as contained in the contracts which were recorded. Macfarlane became proprietor, and took a charter which bound him to observe the same conditions. He presented an application to the Dean of Guild, for warrant to make certain alterations on the property, which were objected to as in contravention of the conditions of his feu right. In an advocacy, the Court *Held*—That the conditions were binding on the vassal; that under them the vassal was bound to build according to particular plans and elevations, and was not entitled to make any alterations thereon; that the magistrates of the city, the superior, and the neighbouring proprietors, were entitled to object to alterations; and that the superior was not barred from so objecting—the former, by having permitted deviations from the plans to be made elsewhere, or the neighbouring proprietors, because they had made slight alterations.

Authorities.—Gordon v. Marjoribanks, Feb. 6, 1818, vi. Dow's Ap., p. 103; Young v. Dewar, Nov. 17, 1814, F. C.; Schultz v. Campbell, Nov. 29, 1815, F. C.; Tailors of Aberdeen v. Coutta, Dec. 20, 1834, xiii. S. and D., p. 226. In House of Lords, ii. Sh. and M.L., p. 609, and i. Robinson, p. 296; Brown v. Burns, May 14, 1823, ii. S. and D., p. 298 (N. E. 261); Cockburn v. Heriot's Hospital, v. S. and D., p.

DUNDAS AND OTHERS v. MORISON.—Dec. 4.

Lease—Rent—Payment of Rent by Bills—Sequestration.

A tenant granted bills for the rent of his farm, for the year 1847, to the factor, who debited himself with the rent in his accounts with the estate. The bills were frequently renewed, but were finally retired by the factor—the tenant died in 1849. Trustees, under a voluntary trust-deed, took possession of the farm, and managed it until superseded by the judicial trustee in a sequestration of the tenant's estate, which was awarded after his death. The trustees for the proprietor (Lord Strathmore) claimed in the sequestration the rent for crop 1847—all subsequent rents having been paid. The trustee rejected the claim. In an action concluding for declarator, that the trustees were preferable creditors for the rent due, and for payment of the rent and interest, the Court found, that the rent was never paid or discharged; that the trustee in the sequestration adopted the lease, and became liable for rents then resting owing; and decreed in terms of the declaratory and petitory conclusions of the libel.—See Dundas v. Hood and Others, June 21, 1853, xv. D., p. 752.

BALFOUR v. BAIRD AND BROWN.—Dec. 5.

Anythment—Liability for an Accident, causing Injury to a Child, in an unfenced Woodyard.

Wood-merchants stored timber in a piece of ground long used for that purpose on the banks of a canal, with the sanction of the Canal Commissioners. There was a road along the bank that was used by the public, but without authority; the yard was not fenced off from this road, but plenty of room was left for the passage of traffic. The pursuer's child was playing with other children among the piles of timber; he was lost sight of for a little, and was found lying on the ground, with some battens that had fallen from the top of a pile, lying upon him. He soon after died. It was proved that the pile was carefully put up, and the battens would not easily have been displaced; disinterested witnesses were of opinion that the child had been climbing upon the pile. The Court held, that the father of the child was not entitled to damages from the wood-merchants, to whom the timber belonged.

Authorities.—Chapman v. Parlane, February 25, 1825, iii. S. D., p. 401; Hislop v. Durham, March 14, 1842, iv. D., p. 1168; Lynch, Queen's B. January 1841, iv. Perry and Davidson; Davidson v. Monkland Railway Company, July 5, 1855, xvii. D. 1038.

BARSTOW v. INGLIS.—Dec. 6.

Transference of Money by Indorsation of a Bank Deposit Receipt.

Maltman, the day before his death, indorsed to Inglis a bank deposit receipt for L.1070; sometime afterwards, on presentation of the receipt, Inglis received the deposit from the bank. Barstow was appointed judicial factor on Maltman's estate, and factor *loco absentis* to his brother and only next of kin. Barstow raised this action against Inglis, concluding for payment of the sum drawn from the bank. Inglis averred, that the receipt had been indorsed to him for behoof of his sister, to whom Maltman intended to make a donation of the money. Lord Neaves (Ordinary) decreed against the defender, in terms of the conclusions of the libel; holding that a deposit receipt, not being negotiable, the indorsation was merely a mandate to draw the money, which fell on the death of the granter; and the money being *in bonis* of him at his death, could only be intromitted with under a confirmation by an executor. The Court, on a reclaiming note, came to the same conclusion as the Lord Ordi-

nary. The Lord Justice-Clerk remarked, that his opinion was founded on entirely different grounds; he held, that the defence was an attempt to prove a donation on death-bed by parole evidence, which being incompetent, the money went to the executor or judicial factor. Lord Cowan remarked—It was unnecessary to decide whether, in other circumstances, as where a sum of money was transferred by indorsation of a deposit receipt, as when it was in payment of a debt, the indorsation would not be good as a transference of the money.

Authorities.—Creditors of Steele v. Wemyss, December 18, 1793, M., p. 1409; Henderson v. M'Culloch, June 12, 1839, i. D., p. 927; Herons v. M'Geoch, November 13, 1851, xiv. D., p. 25; Cruickshanks v. Cruickshanks, December 10, 1853, xvi. D., p. 168; Stair's Inst., 1, 12, 8, ii. More's Stair, p. 787; Ersk. Inst., iii. 3, sects. 30, 40.

STEWART OF MACLAUCHLAN v. BARSTOW (MacLauchlan's Trustee).—Dec. 16.

Seisin.

By a clerical error, the precept of seisin for infeftment in security of certain provisions in a contract of marriage did not specify the symbols to be used. The instrument of seisin was in the usual form. *Held*—That the seisin was effectual. Observed, a precept of seisin was just a warrant for giving seisin; there being full authority in the warrant, it was unnecessary to state the symbols to be used, which were well known and fixed.

Authorities.—Stat. 1672, c. 7; Craig, *de feudis*, L. ii., dieg. 7, sects. 4, 14; Stair, ii. 3, 12; Dallas' Styles, *voce* Real Rights, pp. 697, 763 (fol. edit.); Ross' Lectures (on Original Charter), p. 162, (on Seisin) pp. 197, 833; Bell's Pr., sect. 678; I. Juridical Styles, pp. 12, 524, 471 (third edit.); I. Robert Bell's Lectures, pp. 15, 257; Duff's Conveyancing, p. 100; Earl of Wigton, Jan. 17, 1630, M. p. 14,320; Lamberton v. Laird of Polwarth, Sept. 23, 1680, M. p. 14,309; Lamberton v. Hume, Jan. 1683, M. p. 14,321; Marquis of Clydesdale v. Menzies' Creditors, Jan. 17, 1729, M. p. 14,312; Urquhart v. Officers of State, June 27, 1752, M. p. 9915, affirmed on appeal.

EWING v. YORK.—Dec. 19.

Property—Boundaries—Part and Pertinent—Possession.

The pursuer raised an action for the rent of, and damage to, a piece of ground on the opposite side of the road which fronted his property, and between the road and the river Clyde; and which was for three years occupied by the defender, who was contractor for the erection of one of the bridges across the river, while executing that work. The pursuer produced a title, with a conveyance to parts and pertinents, and which described his property as bounded by the highway on the banks of the river, and offered to prove possession for forty years of the ground between the road and the river. The Court *held*, That the defender being employed by statutory trustees, with power to enter upon and occupy for their operations the banks and bed of the river, he was not in the position of a trespasser; that this not being a case in which the pursuer was endeavouring to resist invasion of his property, his claim was necessarily based on his right of property; that his title as a bounding one excluded the ground on the other side of the road specified as his boundary, and having failed to prove possession of it as a pertinent of his property for more than fifteen years, he had no title to recover from the defender the rent and damages claimed.

Authorities.—Stair, ii. 1, sect. 22, and iv. 28, sects. 1, 2; Ersk. Inst., iv. 1, sect. 15; Fenton v. Simpson, May 2, 1599, Mor. p. 10,597; Mags. of Culross v. Geddes, Dec. 7, 1809, Fac. Col.; Mags. of St Monance v. Mackie, Mar. 5, 1845, vii. D., p. 582.

English Cases.

PRIVILEGED COMMUNICATIONS.—In *Lafone v. The Falkland Islands Co.*, 30 L. T. Rep. 129, the solicitor for the defendants advised them to send out an agent to the Falkland Islands to get up evidence, and they did so. Certain communications were received from the agent, when abroad, by persons in this country, for the information of the solicitor; and the question was, whether plaintiff was entitled to have these documents produced. V. C. Wood held that they were privileged, observing,—“The real test was, whether the agent was doing that which it was ordinarily the duty of the solicitor to do. Clearly, in this case, the procuring of the evidence by the agent was that duty, which, but for unavoidable circumstances, the solicitor himself would have done. It was inconvenient, and it might be impossible, for the solicitor himself to go in person to the Falkland Islands. It might not be convenient or possible to send one of his clerks so far away. What, then, did he do? It was his duty to get up the evidence for the case of the company, as his clients; and therefore he requested and advised them to send an agent to the Falkland Islands for the desired object. That agent was sent out by them accordingly; and being so sent out, set about procuring the evidence. In the course of so doing, he from time to time transmitted it to the solicitor of the company in this country; that is, he wrote letters to persons here, in answer to inquiries made by them at the direction of the solicitor, in order that such answers might be communicated to the solicitor. I am of opinion that that being the purpose with which these answers were made, the case falls clearly within the authorities cited in support of the proposition, that such communications are privileged.”

DEEDS OF LUNATIC.—The doctrine as to transactions by a lunatic, at the time apparently sane, is thus stated by the L. C. in *Elliott v. Ince*, 30 L. T. Rep. 92:—“I know of no such doctrine as that the act of a lunatic is to be inquired into; and if the court is of opinion it is for her benefit that it is to be sustained, and otherwise not. The case of *Molton v. Camroux*, which was referred to, and which is twice reported, first before the Court of Ex., in the second volume of Ex. Rep., and afterwards, when the judgment of that court was affirmed by the Ex., in 4 Ex. Rep., went upon no such ground as that which is here contended for; the principle of that case was very sound, that is, that executed contracts, where the parties had been dealing fairly, and in ignorance of the lunacy, shall not afterwards be set aside. This is a decision which I may describe as a decision of necessity. A contrary doctrine would render all dealings unsafe. How is a shopkeeper who sells his goods to know whether the customer is of unsound mind? Perhaps the same principle may apply to sales of lands, or mortgages of lands. Lord Truro seems to have thought it would; so, at least, I collect from what he says in *Price v. Berrington*, 3 Mac. and Gor. 498. But it is obvious that no such question can arise when there is no contract with a third person—when there is a mere dealing with the lunatic, upon his own property, without any consideration passing from other parties. Still less is the principle on which Sir W. Grant acted in *Niel v. Morley* applicable. There the plaintiff had made large purchases for the purpose of his trade at a public auction, and the evidence failed to show that the seller was aware of any want of capacity on the part of the plaintiff, who was afterwards found a lunatic from a date prior to the auction. Sir W. Grant refused, upon a bill filed by the lunatic and his committee, to give any equitable relief, leaving them to take any legal remedy which might be open to them. Upon a somewhat similar principle Lord Hardwicke decided *Sergeant v. Sealey*, 2 Atk. 412. There the lunatic, before any commission had issued, and while he was apparently sane, purchased a small real estate, which was duly conveyed to him in fee. Afterwards a commission issued, under which he was found luna-

tic from a date prior to the purchase. After his death, Lord Hardwicke, upon a question between real and personal representatives, would not treat the real estate as his own money, but allow the legal right of the heir to prevail. Dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those that have dealt with him on the faith of his being a person of competent understanding."

LEGACY.—Uncertainty.—A publication, called *The Voice of Humanity*, was published periodically by a Society, called "The Association for Promoting Rational Humanity towards the Animal Creation." The testator being connected with this association, by a codicil to his will, gave as follows:—"In continuing *The Voice of Humanity* according to the objects and principles which are set forth in the prospectus attached to the third volume of *The Voice of Humanity*, the sum of L.300 to be placed at the disposal of a treasurer elected by a public meeting at Exeter Hall; this legacy not to be paid till three months after the death of my wife." The association and the publication had both ceased to exist about the date of the codicil. The court held that this was not a general bequest for charitable purposes, the object being uncertain and indefinite; and that the gift had lapsed by the extinction of the object, there being nothing to show that the testator pointed at any new object of the same character for propagating these principles afresh, though under the same name.—(*Marsh v. Means*, 30 L. T. Rep. 89.)

PRIVILEGE.—Arrest.—A party attending an arbitrator in his own case is within the principle which protects persons from arrest who are in attendance in a court of justice, *eundo, morando et redeundo*.—(*Re M'Intosh* Q. B. 30 L. T. Rep. 160.)

—The plaintiff in a civil action cannot, to enforce his claim, withdraw a person from attendance on a court of justice. The privilege applies to all courts of justice, and the party need not be attending under compulsion of process. Therefore a witness attending a Police Court on the day to which a case of felony (as to which he had already given evidence) had been remanded, was held privileged from arrest.—(*Montague v. Harrison*, 30 L. T. Rep. 135.)

RAILWAY.—17 and 18 Vict., c. 31—Traffic—Undue Preference.—Pickford and Co., the carriers, made an application against the North Devon Railway Company, under the above statute, in these circumstances:—"Manchester packs" are carried over the London and North-Western and Midland lines to Bristol; thence by the Bristol and Exeter to Crediton; and thence by the defendants' line to Barnstaple. The charge for the whole distance was formerly L.2, 12s. 6d. a ton; latterly, defendants reduced the rate to L.2, 10s., for all goods "sent by C. and Co. from Manchester to the care of J. C. Wall of Bristol;" whilst no reduction was made to the complainants and the general public. The object of the arrangement was to enable the railway to compete with a steamer from Bristol, Wall seeing to their transshipment from the one line to the other. The Court of C. B. ordered the defendants to charge all their customers alike for the carriage of like goods, by whomsoever forwarded.—(*Baxendale v. The North Devon Railway Co.*, 30 L. T. Rep. 134.)

COPYRIGHT.—Injunction.—The author of a work, hearing that an edition was being brought out without his authority, applied for an injunction against the publication, and to make the publisher pay over the gross amount received from the sale of any copies, and to deliver over any copies unsold. By sect. 23 of 5 and 6 Vict., c. 45, the proprietor of the copyright is entitled to sue for the recovery of all copies unlawfully sold, or damages for the detention thereof, or to sue for damages for the conversion thereof. *V. C. Wood* held, the owner was entitled not to the gross proceeds, but the net profits only of the copies sold, and to have all the unsold copies delivered up to him, without making any compensation for the printing; reserving to him his action at law for damages for the conversion.—(*Delf v. Delamotte*, 30 L. T. Rep. 129.)

THE

JOURNAL OF JURISPRUDENCE.

THE ABOLITION OF WRITTEN PLEADING.

DECLINE OF LAW LEARNING IN SCOTLAND.

THE late Lord Rutherford was a man of whom the profession of the law in Scotland might well be proud. If he had spoken in the accent of Lord Cockburn, he would have been the most effective advocate of his time. He had the faculty of the clearest statement, united with the most comprehensive and accurate knowledge of the law. His varied accomplishments, too, were not confined to his profession. With general literature and science he possessed an acquaintance so great, that we only look for it in the case of men to whom the possession of fortune has given leisure and opportunity, and which, in the case of one overwhelmed with the engrossing cares of professional life, excites our admiration and astonishment. Yet all this has passed away without leaving any trace, except in the fleeting recollections of his friends and contemporaries. Another generation will see his name in the lists of Lords-Advocates and Lords of Session; but there's the end! Of his learning and accomplishments there is no enduring record in writings or judgments. He lived too short a period after his elevation to the Bench to achieve a reputation as a judge. In this he has only had the fate of George Cranstoun, of whose name and history another generation will know scarcely anything. In neither case are their names connected, as counsel, with any great trial of such interest and importance as to come within the domain of general history; and the Acts of Parliament of which Rutherford was the author, and which are partially linked with his name, are of too special an interest to save his memory from "the tooth of Time and razure of Oblivion."

It is of one of these Acts that we are now to speak—one of the innumerable Acts which have been directed to the never-ending reform of the procedure and practice of the Court of Session. Their number can be counted, not by tens, but by hundreds. Every popular outcry produces a new one; and each new Act

creates its own train of evils, to be again removed by a fresh legislative start. There is not, in truth, a more dreary chaos in the whole range of Scottish law, than the legislation applicable to the Supreme Court of Scotland. The experience of a lifetime cannot master the thousand arbitrary, often inconsistent and impracticable provisions, embodied in Acts of Parliament, Acts of Sederunt, and thousands of decisions on points of practice which regulate the procedure of the Court of Session. The energy necessary to the advocacy of the merits of a case, is wasted and frittered away in the endeavour to comprehend the forms of process; and ruin has often overtaken the best cause, in consequence of some pitfall as to the practice, from which even the most learned and most cautious have been unable to save themselves. It is high time that this discreditable mass of inconsistent, confused, and arbitrary rules, should be superseded by a GENERAL CONSOLIDATION ACT, which would do for Scotland what has been done for the Common Law Courts of England, and which the legislators of New York recently accomplished with great national advantage. The subject is one worthy of the consideration of the Government; and if the Lord Advocate, who has already done so much for the improvement of the law, only added this to his achievements, he would secure the lasting gratitude of his country, and be entitled to the foremost place in the rank of law reformers.

In the year 1850 there was a popular clamour against the court. Its delays, its expense, the endless appeals, the antiquated formalities, were the subject of popular indignation, and afforded capital for several radical reformers. Of course, therefore, there was a new Act of Parliament, which was to put the whole machinery right, and to remove all grievances for evermore. We got it; and since then we have had another; and still another is demanded. In the Court of Session Act of 1850 there were many provisions which simplified the procedure, and removed grievances that impeded the action of justice. Some of them were too good! They took a too hopeful view of human nature! They were of a character unfitted for practical life, and have, in consequence, passed into oblivion. Among these is the provision contained in the 50th section, which allowed the parties to choose arbiters, who were to sit as a jury, under the control of a judge, and before whom counsel were to plead. This was a favourite idea of the author of the Act; but it has never commended itself to the profession, and the 50th section has, in consequence, remained a dead letter to this hour. No case has ever been tried in the manner allowed by it. The litigants are always too suspicious of each other to fix on the men of skill. What one proposes, the other opposes. In all cases where a trial must be had, the rough course of a common jury, selected from men turned up by the ballot-box, must be resorted to; and it has one recommendation, that if not the safest, it is at all times the cheapest.

But there is one provision in this celebrated Act of 1850 which

has had more influence on the course of pleading in Scotland than any other enactment which has become law for a hundred years. From the time of the institution of the College of Justice, pleading in Scotland was carried on in writing; and only in famous cases was there an oral debate, which was regarded very much in the light of a *cause celebre*, or a holiday entertainment. The court was filled with ladies, to see Cranstoun attitudinise, or hear John Clerk abuse his opponents and the judges. The Lords Ordinaries, as well as the Inner House, usually disposed of cases upon printed minutes of debate, prepared and deliberated upon at chambers; and thousands of volumes, which now occupy the shelves of our law libraries, testify to the learning and ability with which these pleadings were conducted. All this has, however, now passed away. It occurred to two men, deservedly of great influence in the profession—the present Lord Advocate and the present Dean of Faculty—that the system of written pleading had been abused; that the Lords Ordinaries, whenever they met with difficulties, “rushed into cases,” and that, in consequence, there was a grievance that could only be remedied by taking from the Lords Ordinaries all power of ordering minutes of debate. What was the grievance which could only be remedied by such a stern enactment, it is difficult now to comprehend. At all events, the evils which have resulted from the remedy, have been ten times greater than any which existed before it. The influence, however, of these lawyers—themselves the first in both kinds of pleading—was great with Mr Rutherford; and the result was the 14th section of the Court of Session Act, which is in these words:—“And be it enacted, that it shall not be competent to the Lord Ordinary to direct cases or minutes of debate, or other written argument, to be prepared by the parties, whether for the use of himself or of the Inner House.”

These four lines have had a greater influence upon the pleading in the courts of Scotland than all other Acts of Parliament, or Acts of Sederunt, or decisions of the courts, since law was practised as a science in Scotland. Under their operation the learning of the law is fast disappearing. It is true that the Inner House has not been laid expressly under interdict; but the spirit of the enactment has been carried out there. Since it became law, we believe that not a dozen cases have occurred, where either division has ordered written pleadings, however difficult the subject or important the stake. The debate has been entirely oral; and no one who looks on this picture and on that—who contrasts the reports of these days with those of former times—can say with truth, that the law has benefited by the change. The first circumstance that strikes one, is the total disappearance of anything like general learning in the mode in which cases are handled. Pothier, and Voet, and Vinnius, and the *Corpus Juris*, and all the familiar words of ancient days, occur no more. Listen to the best speeches in the court, and you hear nothing in the shape of reference to authority, but a quotation from a speech

of yesterday delivered, in all probability, by the judge to whom the address is made. The speeches are admirable *ad captandum* addresses upon the special case, without any reference to those general principles of jurisprudence familiar to the great advocates and judges who have reduced the law of Scotland to the precision of a code. Open the Corpus Juris at the present day, before any of the Supreme Courts of Scotland, and you are immediately met with the sneer, that your case must be bad indeed, when it requires such authority. Even the sound sense of Pothier, and the practical sagacity of Voet, can no longer command the respectful attention with which they were listened to of yore. Craig is worse than an old almanac; Stair even is antiquated; and a lawyer's library in modern times may be safely compressed into the following treatises, viz.:—Any treatise on the Bankrupt Law, Shand's Practice, Macfarlane on Issues, Barclay's Justice of Peace, the Judicature Act, and Act of Sederunt relative thereto, the Court of Session Act of 1850, the Decisions since 1841—which last, however, are not essentially requisite, if the party be possessed of the third volume of Shaw's Digest. These books, when properly handled, are the whole works necessary for the law library of a working lawyer of this generation.

The reason of this is perfectly obvious, and may be stated under two heads. In the first place, although every person of education can read Latin and French, it does not follow that he can understand half a page when read to him from the bar. A passage of Voet, perfectly clear and intelligible in a printed minute of debate, becomes a mass of unintelligible sounds when thrown at the head of a judge, even by a counsel who speaks it in the best manner of Oxford. To read aloud a page of Pothier (except, of course, when done by one who has spent the long vacation in or about the Quartier Latin), will scarcely be ventured upon even by the boldest counsel who is driven to his shifts for authority. To translate it into English at the bar, is a tacit acknowledgment of incapacity which no one is willing to make, and is half an insult to the judge, who is presumed to be as well acquainted with the language of the authority as with his own. Hence it has necessarily followed, that the conditions for the proper appreciation of Latin and French authorities, no longer existing, they have ceased to be quoted; and the works of Pothier are covered in the library of every Scottish lawyer with undisturbed dust. Some, though we hope few, may think this an advantage. We confess that we look on it as one of the greatest calamities that has ever overtaken the administration of justice in Scotland. It must necessarily end in rendering our law narrow, contracted, technical, and provincial. It will take away from it its great characteristic of being a code the least encrusted with technicalities, which has existed among European nations since the fall of the Roman Empire. And this result is the more to be deplored, that it occurs at a time when the English courts are widening the sources from which they derive light for their decisions, and losing

that character of technicality which renders their law so uninteresting and unintelligible to foreign jurists.

In the second place, we have been guilty of the gross inconsistency of abolishing written pleadings, and yet retaining the habits which were only justifiable when that system was in existence. Written pleading is intended for study in the closet; oral argument for the open court. But under the present practice, we have the defects of both systems, without the advantages of either. In opening a case to the court, you are soon made to feel, and are sometimes told, that the judge has already read the record,—that is to say, the bare statement of facts; and already, before hearing your explanation or your argument, you soon find he has formed his opinion. When the argument had been stated in detail in a written minute, this might have been endurable; but when the argument upon which the conviction is to be founded, is yet to be heard, there could not be a system more calculated to create dissatisfaction, and to nourish that irritation which keeps up the never-ending flow of appeals to the House of Lords. Cases must *necessarily* be often misapprehended, often at least half understood; and yet the judge has arrived at the positive and assured conviction, which no argument or authority can shake. We forbear to describe the scene which follows between the court, and the counsel who sees that his case is lost, and that (to use the too oft-repeated term) “a bowling out” then and there will take place the moment he can be stopped. This prejudging of cases is the necessary, natural, and inevitable result of a previous study of these records. It happens with all judges. We complain not of *men*, but of a vicious system. And what is worse, you have one judge who has read all his papers—another who has read half of them—and another, with a correct apprehension of the imperfect system under which we now act, who has never untied the strings. All honour to the last. Perhaps he has put himself in better condition for administering justice, by not even knowing the names of the parties, before; on the day of hearing, he meets their counsel face to face, and learns the merits or demerits of the suit from their lips. It necessarily follows, where you have to address a court not alike acquainted with or ignorant of the case, that that one is impatient with the history of those details which the careful study of last night has made familiar to him, and which are impressed with such vivid distinctness on his memory. The judge who has yet to learn the facts is passive, and must often concur in a judgment (especially if it be “a bowling out”) which has followed upon an imperfect statement of the facts—imperfect because of the erroneous assumption made by the counsel, that all are upon a par with the judge who intimates that he is already familiar with the facts.

In any future measure, which may consolidate into a system the crude and undigested mass which constitutes our present legislation on practice, we submit that one of its prominent provisions should be

the repeal of the 14th section of the Court of Session Act of 1850. That enactment was supported indeed by the two eminent counsel to whom we have referred; but it was condemned unanimously by the largest committee of the Faculty of Advocates that ever sat on any of the legislative enactments of recent years. It was condemned by the Writers to the Signet; it was condemned by the other legal bodies practising before the Supreme Courts. The remonstrants were informed that oral argument was the system in force in England, and that therefore it should be adopted here. The logic of this was not quite apparent; and the answer given to it by an eminent counsel now upon the bench was this:—"It may be so, but which system is the best? In the one case, you have a written paper, in which you can deliberately trace the whole law upon the subject, and exhibit those authorities of a more recondite character, which it is difficult to cite in an oral debate. A printed minute is cheaper than an attendance of four counsel and two agents; it is satisfactory to the client, who finds his case stated in a form that he may read, though he may perhaps be unable to understand it all. Oral debate, on the other hand, is totally unfitted for all that class of cases which turn upon tracing the history of the law, or on the examination of a multitude of decisions." But all remonstrance was in vain; and now, after the experience of seven years, we do not suppose that the conclusion will be controverted, that the legislative bar to written pleading in the Outer House, followed up by its practical abolition in the Inner House, was an error.

• In what we have now written, we only endeavour to give expression to the prevailing opinion. Our demand is the moderate one stated in the following language of the Faculty of Advocates:—

"While the committee think that some restraint should be put upon the present system, they also think that this might be effected without depriving the Lord Ordinary altogether of the aid of written argument in any case where he considered it useful. They would propose that the clause should stand as it is, in so far as it allows the Lord Ordinary to report to the Inner House without cases; that it should be competent to him to order written argument for himself; but it should not be competent to print this argument for the Inner House, unless this be expressly ordered, with or without revisal, by the Court, after the case has been heard. The committee think it right to state, that they have come to this conclusion on the general views, *that the judges of the Inner House should not be held to have formed an opinion in any case, until the parties have been heard at the bar.*"¹ If the opinion were formed upon minutes of debate, we humbly think there would be little, if any, ground of complaint. It is the system of forming opinions

¹ Report of the Committee of Faculty to consider the bill to facilitate the procedure in the Court of Session in Scotland. 1849.

upon no argument at all, that creates the dissatisfaction now existing, and which will in the end reduce the province of the advocate to a mere name.

The change has not been confined to the supreme courts. The Sheriff Court Act of 1853 introduced the system of oral pleading there; and, except in the shape of one reclaiming petition, written argument is prohibited. The result has been much the same as in the Court of Session; but a bad judgment by a sheriff can be set right at small expense in an advocacy; while a bad judgment of the Court of Session—or a judgment given where a man thinks he has not been heard—and so gets passionate and angry—cannot be set right by the House of Lords, without the expenditure of a sum that would tocher a daughter, or set a son up in business.

ON THE LAW OF FRAUD IN CONTRACTS.

(Continued from p. 13.)

WHEN a man is *sciens et prudens*, or not alleged to be the reverse, lesion from a contract, and general averments of circumvention, will not make a relevant case.—(Kyle, 1832, 11 S. 87. MacLagan, 1832, 11 S. 168.) Neither, by our law, will a deed be reduced on facility and lesion merely. In Scott (1798, M. 4964), a testament by an old man, whose memory was weakened by disease, and who did not fully understand the consequences of the testament, was sustained, because no fraud was averred, “and something less than insanity.” In Scott (1825, 3 Mur. 518), Lord Pitmilley laid down as law that facility and inadequacy of consideration were not sufficient for the reduction of a deed; and that “unless a party is in such a state, that if he were taken before a jury he would be cognosced as a lunatic or idiot, he is held capable of managing his own affairs.”

But this doctrine must certainly be received with some qualification. For it must be admitted, that there can be no better proof of fraud than great lesion with facility; and it is, besides, a settled rule that, in the reduction of a deed, the more the facility, the less the fraud necessary to be proved, and, on the other hand, the more fraud the less facility.

The doctrine laid down by Lord Wynford would probably be held as a sufficiently correct statement of the law of Scotland as well as of England. “Those who,” he says, “from imbecility of mind, are incapable of taking care of themselves, are under the special protection of the law. The strongest mind cannot always contend with deceit and falsehood. A bargain, therefore, into which a weak one is drawn, under the influence of either of these, ought not to be held valid. . . . A degree of weakness of in-

telleet, far below lunacy, if coupled with other circumstances to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside any important deed. The doctrine, therefore, may be laid down as generally true, that the acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion, that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, and overcome, by cunning, artifice, or undue influence."—(Blackford v. Christison, 1 Knapp R. 77.)

The incapacity of a party is to be considered not abstractly, but in relation to the deed which he has executed. As a general rule, it requires more capacity to execute a contract than a testament; and, therefore, a contract may be set aside though the degree of facility proved be not sufficient for the reduction of a testament.—(Watson, 1825, 4 S., 200. Aff. 1827, 2 W. & S., 648. Dewar, 1836, 14 S., 1132. Howe, 1842, 4 D., 1184.)

Contracts granted under the influence of temporary insanity are null, as wanting consent. In regard to contracts entered into in a state of intoxication, it seems reasonable that a distinction should be taken between those granted by a man when in excessive and utter intoxication, in which case there cannot possibly be consent, and those granted when the intoxication is not so great, inducing rashness and inconsideration merely, in which latter case the party has himself to blame.—(Jardine, 1803, M., 684. Hunter, 1804, M. 686.) But it would rather appear, that if one man make another drunk, in order the more easily to induce him to sign a deed to his prejudice, the deed will be reducible as induced by fraud.—(Stair, More's notes, lix.)

A man is liable only for his own fraud and not for the fraud of another; *culpa tenet suos auctores*. And, on the other hand, if a man commit fraud, he is liable for the consequences, whether the fraud be intended to benefit himself or not, or whether he be a party to the transaction which is induced by his fraud.—(Watson, 1825, 4 S., 200.) In some cases a man may even be liable for the consequences resulting from the fraud of another; if, knowing that fraud he conceal or do not disclose it, in accordance with the maxim, *fraus est celare fraudem*. The rule that a man is liable only for his own frauds, is subject to the exception, that he will in general be liable for the fraud of his agent in the business which he has intrusted to him. The maxim will then apply, *qui facit per alium facit per se*. A man will thus be liable for the consequences of his own frauds, committed by the means and hand of his agent, or for the personal fraud of his agent acting for him; and, probably, even although the agent's fraud be against the orders of his principal, at least in some cases; as, for instance, if a servant in selling a horse, whose faults his master had told him to disclose, should fraudulently conceal them or misrepresent on the subject; because, if somebody

must lose by a fraud, it seems more equitable that he should lose who trusted the agent, and must be supposed to have had the means of knowing his character, than a third party, who may know nothing of the agent except that he represented his employer; nor can a man have the benefit of a fraud while he repudiates the act from which the benefit arose.—(Addison on Contracts, p. 632. Pothier on Obligations, vol. i., p. 60; Part i., Ch. 1, Sect. i., Art. 5, No. 79.)

On the effect of fraud on the creditors or *bonâ fide* and onerous assignees of the party guilty of the fraud, it seems unnecessary to do more than refer to the elaborate opinions of the majority of the judges, in the important case of *Mansfield v. Walker*, in which the whole subject was reviewed and carefully considered. The substance of these opinions appears to be as follows:—

When the subject matter of the contract is feudal, and the title complete, a *bonâ fide* and onerous purchaser from the party who committed the fraud, cannot be affected by anything not appearing on the record; neither are creditors liable to latent objections, unless they render null and vitiate the constitution of the contract.

The subject matter of the contract may be an incorporeal right or a moveable; in either case, the title of a *bonâ fide* and onerous purchaser can be defeated only by a *labes realis* in the original contract, such as forgery; the rule of "*tantum et tale*," which some of the older authorities seem to support, cannot, in that case, be stated as law, to any greater extent. The plea of *dolus dans locum contractui* is a good plea against the creditors of the party who committed the fraud; but no obligation or personal exception which may be pleadable against him, if it does not amount to *dolus dans locum contractui*, can be pleaded against either the *bonâ fide* onerous assignee or the creditors.—(Redfearne, June 1, 1813; 1 Dow, 50. Gordon, 1824, 21 F. C., 444. Mansfield, 1833, 11 S. 811: Aff. 1835; 1 Sh. and M'L., 203.)

Remedy against fraud may be by reduction of the deed or transaction induced by it, by action of damages or by defence.—(Oliver, Feb. 1, 1840; 2 D., 518. Ersk., 3, i. 16.) It has been laid down that proof of greater fraud and injury will be required to set aside a completed transaction, than to set aside or refuse implement to a contract not completed. "There is a very great difference between a matter executory and a matter executed. Thus, for instance, if you have a bill for a specific performance, much less misrepresentation and fraud may be necessary to answer that bill, and to call upon the court to refuse to decree specific performance, than would be required, after execution of the contract, to set it aside. After the contract is executed, it would require a great deal more stringent proof of fraud, *dolus dans locum contractui*, to set aside an executed contract, than would be required to prevent specific

performance, if the matter had rested in fieri, and had been executory merely."—Per Lord Brougham in *Burness*, 1849, 7 Bell's App., 541.

It has been already noticed that, in libelling an action on fraud, the court require great minuteness and precision in the averments of the facts which are alleged to have constituted the fraud. Not only must the general ground of action support the conclusions, but the facts averred must support the general ground of action. In this respect, actions on fraud are broadly distinguished, and are quite exceptional from the ordinary run of actions. Thus, a series of letters, not of themselves showing fraud, cannot be raised into a relevant ground of action, by a general averment that they were concocted and written with fraudulent intention. Where no defect in the capacity of the person defrauded is alleged, "it is a fundamental rule of practice, in all cases of fraud, that the facts relied on must be so stated as to enable the court to judge whether, if proved precisely as stated, they truly amount to fraud." "No man is entitled to charge another with fraud without knowing in what the fraud consists, and if he knows, he can have no difficulty in stating it."—(Per Lord Deas in *Leslie v. Lumsden*.) And, on the same principle on which the court requires, in cases of fraud, "a very different specification of facts from what they do in ordinary cases;" they "have also been in the habit of requiring that the relevancy of these facts shall be clear, before a charge so gravely affecting character shall go to a jury."—(Lord Deas in *Gillespie v. Russell and Son*, July 1857, 19 D. Shedden, 1852, 24 Jur., 331. *Leslie*, 1856, 18 D., 1046. *National Exchange Co. of Glasgow*, 1855, 2 Macqueen, 103. *Gillespie*, 1856, 18 D., 680: and *Gillespie*, 1857, 19 D.)

An averment of fraud by concealment, without an averment of duty to disclose, is irrelevant.—(*Irvine*, 1850, 7 Bell's App. 186.) An averment of undue misrepresentation and concealment, is not necessarily an averment of moral fraud, it covers the case of legal fraud also.—(*Railton*, 1844, 3 Bell's App. 56.) An averment of misrepresentation only, is not an averment of moral fraud at all.—(*Oliver*, 1840; 2 D., 518.)

An averment of fraud lets in proof *prout de jure*.—(*Moses*, 1773, M. 12352)—but the fraud is not to be presumed, but must be clearly proved. This is necessary on account of the frequently uncertain, indefinite, and doubtful nature of fraud, the great inequalities of prices, the personal prejudice and bias apt to be created by such cases, and the propriety of not permitting a man's character to be rashly assailed on insufficient grounds. Our law has not adopted the maxim *ex re presumitur dolus*.—(*Nisbet*, 1698, M. 4872.) Yet, there have been special cases in which, on account of the relations of the parties, or the circumstances of the party defrauded, as in cases of extortion under pressure of pecuniary difficulties, or of fraud when the parties are in confidential relations, where this rule

seems to have been acted on.—(Taylor, 1824, 2 Sh. App., 254. Leiper, 1822, 1 S. 591. Ewen, 1830, 4 W. and S. 346.)

That the party raising an action on the ground of fraud was himself participant in the fraud, is a sufficient defence,—(M'Ghie, 1829, 7 S. 797),—or that the party complaining, was also guilty of fraud against the other party in the transaction complained of; as, for instance, if both misrepresented, or, each being only partially informed, abstained from disclosure. Yet, no doubt, it will be necessary to take into account differences in degree of blame; as, for instance, in the case of two parties participant in a fraud, if they be not on an equal footing, and the one coerce or exert undue influence over the other, the latter will probably have relief if he suffer damage in consequence, although his own conduct may not be perfectly free from blame. That the party would have entered into the contract, whether there was fraud or no (though this will not often be capable of proof, except as inference from the immateriality of the matter affected by the fraud), that he discovered the fraud, and yet proceeded with the contract, that the fraud was subsequent to the contract, that the party homologated the contract after discovering the fraud, are all conclusive answers to an action on fraud.—(Irvine, 1850, 7 Bell's App. 186. National Exchange Co. of Glasgow, 1854, 16 D. 1086. Rigg, 1776; M. voce Fraud, App. No. 2.) But mere mora of any duration is no defence. "No length of time can prevent the unkenning of fraud." If the party complaining of the fraud has unduly delayed to bring his action, that will subject him to suspicion, and his case will be narrowly watched; but, on the other hand, if the delay was only because the fraud was not discovered, then it is in truth an aggravation of the injury done. "Every delay arising from a fraud adds to its injustice, and multiplies the oppression."—(Irvine, *ut sup.* Shedden, *ut sup.* Leslie, *ut sup.* Alden v. Gregory, 2 Eden. 285. Cotterel v. Purchase, 1 Ves. Jun. 160.)

On the whole, it appears that, according to the law of fraud in contracts, contracting parties are considered as divided into two classes—those who are of ordinary intellect, and those whose mental imbecility, permanent or casual, lays them peculiarly open to imposition. The law affords redress to the latter in most cases, if they enter into transactions to their lesion, and if the nature of the transactions or the greatness of the lesion indicate that an unfair advantage has been taken of their facility. The law presumes that contracting parties who do not come under this class, are capable of protecting their own interests, and, if they are defrauded, their remedy is to some extent limited. Such cases are not to be considered by themselves, but in reference to general interests; they should be brought under some definition or category of fraud. Regard must be had to the necessity of maintaining the finality and security of concluded transactions, as essential to the existence of commerce, to the impossibility of determining, in many cases, whether

or not there has been any departure from strict honesty, to the great risk of practically injuring the honest and affording assistance to fraud if the rule were drawn too strictly, to the bad effect which would follow, if men in business were relieved from the necessity of relying on their own caution, industry, and knowledge, to the impracticability and absurdity of attempting to protect from loss those who are negligent of their own affairs, and to the necessity of preventing rash and unfounded charges against character.

Proceeding on these principles, the law further protects parties, who, from their social position or from the force of circumstances, are under the influence of others, examines their deeds carefully, and exacts the strictest good faith. The law further affords protection to confidence reposed warrantably, either because reposed in near relatives, or on account of the confidence implied in, and necessary to, certain professional and social relations, or arising from the nature of certain contracts, by imposing on the party trusted, the legal duty of disclosing all the circumstances material to the transaction, and by holding non-disclosure to be legal fraud; or in cases in which fraud would be peculiarly easy of commission or difficult of detection, and of a general tendency more than ordinarily injurious, by the preventive measure of declaring the parties incapable, to a certain extent, of contracting, or by declaring that certain deeds between them shall be invalid or revocable.

But, in the general case, it is only when a man is in possession of exclusive information, or when reliance for information is explicitly reposed in him, that there lies on him any legal duty of disclosure. He may use the advantages which chance or skill puts in his power. But "industrious concealment," devices for confirming known error, for preventing the party from acquiring information, or positive misrepresentation will, in general, be sufficient ground for the reduction of a deed or transaction. Not, however, misrepresentation of the quality or value of a thing, or of any one's motives, expectations, or opinions about a bargain. In sales, the maxim, *caveat emptor*, governs these latter cases.

In all reductions on the ground of fraud, it must be clearly proved that the fraud was committed before the date of the contract, was of importance to the contract, inductive of it, and the act of the party from whom redress is demanded, and, in general, the circumstances must be stated in detail. For the rest, the law affords all facilities of process, and by evidence, for the detection of fraud; and no delay can affect the claims of a party defrauded, except in so far as his evidence has been lost in consequence, or to the extent to which the party accused may seem entitled to plead that the evidence for the defence has been lost also.

In the foregoing brief and meagre outline of the more important rules of the law of fraud, as they seem to have been settled in the Courts of Scotland, fraud, as inducing and affecting settlements, has been mentioned only incidentally, and by way of illustration;

and the important branch of law relating to fraud on creditors, by sales *retenta possessione*, by deeds to conjunct and confident persons, or executed on the verge of bankruptcy or otherwise, have not been referred to at all. Neither appeared to come within the scope of the subject treated of, and no branch of law has been more thoroughly investigated than the principles which regulate questions arising out of fraud against creditors.

THE NEW STATUTE LAW.

THE REGISTRATION OF LONG LEASES ACT.¹

THIS statute creates so many important changes in leasehold property, that we propose to examine its provisions in detail. Its object—in the absence of any preamble setting it forth—may be generally stated to be, to confer certain privileges on certain leases, on compliance with its terms; and that registration is not rendered necessary, save “for the purposes of the Act” (sec. 2).

1. *WHAT LEASES MAY BE REGISTERED.*—1. *Lease must be probative.*—No lease can be registered, under this Act, except it is probative, sec. 1. A lease probative against one of the parties only, whether landlord or tenant, would not come under the designation “probative lease,” even though valid as a contract against both. On the other hand, a lease, in which several parties are named as tenants, might be held to be a probative lease, though only signed by one of them and the landlord—there being, in this case, *ex facie*, a lease probative against both a landlord and tenant. The question, whether or not it would bind the parties, would depend upon circumstances, and would not be affected by its registration.

2. *Lease must endure for thirty-one years.*—The Act does not apply to leases for periods less than thirty-one years. But, by sec. 17, “Leases containing an obligation upon the granter to renew the same from time to time, at fixed periods, or upon the termination of a life or lives, or otherwise, shall be deemed leases within the meaning of this Act, and registerable as such, provided such leases shall, by the terms of such obligation, be renewable from time to time, so as to endure for a period of thirty-one years or upwards.”

The meaning of this enactment is by no means clear; but it seems to be this—that, where a granter of a lease (that is, a landlord) is so bound to renew a lease, that the tenant has it in *his* power to make the lease endure for thirty-one years, the lease is registerable. In the case of an obligation to renew a lease for a period less than thirty-one years, after a *liferent*, it is thought that

¹ “An Act to provide for the Registration of Long Leases in Scotland, and Assignation thereof.—(10th August 1857.)

the doubtful endurance of the liferent would prevent the tenant from taking the benefit of this clause, because, by the terms of the obligation to renew, it does not appear that the tenant has it in his power to make it endure for thirty-one years. Whether such a lease may be registered after the liferent is over, and a renewal obtained for a period which, together with the liferent, will make the lease a lease for thirty-one years, may be doubted. On the one hand, it may be said that the *terms* of the obligation do not import an obligation for thirty-one years; and, on the other, that it is in terms of the obligation that the lease has been renewed, "so as to endure for thirty-one years." In estimating the period of endurance, either the liferent is to be taken into account, or it is not. If it is not, the only effect of the clause is to make the lease registerable during the currency of the liferent, and while it is yet doubtful whether it will be renewed.

3. *Extent of subjects let.*—No leases executed *before the date of the Act* are excluded from registration, in respect of the extent of the subjects let.

Leases executed *after the date of the Act* (except leases of mines, minerals, or burgage subjects), must not extend to more than fifty acres. Sec. 18.

Leases executed after the date of the Act, in terms of an obligation to renew, contained in a lease dated before the Act, are held to be in the same position as leases dated before the Act.

4. *Name and extent of lands to be mentioned in certain leases.*—In leases of subjects *not burgage*, executed after the passing of the Act, the name of the lands, of which the subjects let consist or form a part, must be mentioned.

The extent of subjects let must also be mentioned in future leases (except those of burgage subjects, and of mines and minerals).

Leases executed after the Act, in terms of an obligation to renew, contained in a lease dated prior to the Act, are held to be prior to the Act. Sec. 18. On this section we may remark, that an error occurs in the rubric, in so far as it states that a lease is not to be registerable "where name of lands and boundaries not given;" whereas the expression in the clause itself requires only the name and "*extent* of the land let" to be set forth.

II. REGISTRATION.—1. *Registers.*—Leases of subjects not held by burgage tenure may be registered either in the General Register of Sasines, or in the Particular Register of Sasines, for the district in which the lands or heritages are situated. Leases of subjects held by burgage tenure must be recorded in the "Burgh Register of Sasines" of the burgh where they are situated. Leases of subjects within burgh, not held by burgage tenure, must be recorded either in the General Register or in the Particular Register for the district in which they are situated.

Assignations and other writs must be recorded in the Register in which the lease to which they refer has been recorded; so that, if

a lease has been recorded in the Particular Register, the registration of an assignation in the General Register would be ineffectual, and *vice versa*. This provision will save the necessity of searching the two Registers for assignations, or burdens on a lease, when it is known in which Register the lease has been recorded.

2. Mode of Registering—Certificate—Date.—Section 15 directs that, on any writ being presented for registration under this Act, it “shall be forthwith shortly entered in the Minute Book of the Register, in common form, and shall, with all due dispatch, be fully registered in the Register Book, and thereafter re-delivered to the parties, with certificates of due registration thereon, which shall be probative of such registration; such certificates specifying the date of presentation, and the book and folio in which the engrossment has been made, and being subscribed by the Keeper of the Register; and the date of entry in the Minute Book shall be held to be the date of registration.”

The intention of this clause is evidently to make rules for the registration of leases, similar to those existing for the registration of sasines.

Entry in the Minute Book is to be made forthwith, and is to be held to be the date of registration. It is the practice at present to enter writs presented for registration in the Register of Sasines, first in the Presentation Book, from which the Minute Book is afterwards made up.

A question might be raised by a party presenting a lease, and insisting upon its being “forthwith” entered in the Minute Book in common form, in terms of the statute. The word “forthwith” may bear different interpretations; but here it evidently means “at once,” and stands contrasted with the “all due dispatch,” which is to be used in getting the deed recorded. The words, “in common form,” appear to relate to the form of the entry itself, not to the form of procedure of which the entry is a part. It is to be observed, that it is the date of entry in the Minute Book, and not the date of presentation, which is to be the date of registration. An entry thus made in the Minute Book, would effectually cut out a lease entered in the Presentation Book of an earlier date, not yet entered in the Minute Book; for, though this first presented lease might be entered in the Minute Book as presented of an earlier date than the lease standing before it in the Minute Book, it is not the date which the entry in the Minute Book bears to have been the date of presentation, but its own date, which determines the date of registration.

A similar question might be raised, by a lease being entered in the Minute Book of a Particular Register before one sooner presented at the General Register had been entered in the Minute Book of that Register.

The only doubt seems to be, whether the Presentation Book can be held to be part of the Minute Book. If the entry in the Presentation Book is to be held to be an entry in the Minute Book, to the effect of fixing the date of registration, it must be held to be the statutory entry in the Minute Book; and if so, it will be

effectual for all purposes, and a lease may be effectually registered without being entered in the regular Minute Book at all. On the other hand, if the entry in the formal Minute Book is to be held to be the statutory one, the Presentation Book has no legal value. Instruments of sasine, etc., are in a different position, because the *date of presentation*, as certified by the Minute Book, not the date of entry in the Minute Book, is, in their case, the test of priority. That the statute now under consideration, intends the date of presentation to be the same as the date of entry, is obvious; for it requires the certificate of registration to contain the date of *presentation*. The course which the statute contemplates, and the safe course, is, to enter the leases and relative writs at once in the formal Minute Book, on presentation. This will, no doubt, give them a precedence in the Minute Book over sasines and other writs waiting their turn in the Presentation Book, if it is to be continued; but these writs will not suffer, because their validity is determined by the date of presentation.

III. EFFECT OF REGISTRATION.—Sec. 2 contains the leading provisions of the statute. It is in these terms:—

Leases registerable under this Act, and valid and binding as in a question with the granters thereof, which shall have been duly recorded as herein provided, at or subsequent to the date of entry therein stipulated, shall, by virtue of such registration, be effectual against any singular successor in the lands and heritages thereby let, whose infeftment is posterior in date to the date of such registration: Provided always, that, except for the purposes of this Act, it shall not be necessary to record any such lease as aforesaid; but that all such leases which would, under the existing law prior to the passing of this Act, have been valid and effectual against any such singular successor as aforesaid, shall, though not recorded, be valid and effectual against such singular successor, as well as against the granters of the said leases.

Before considering this enactment in detail, it may be well to consider its effect generally. It confers a privilege on certain leases, on their being recorded; and it declares that leases, the holders of which do not seek to avail themselves of the privileges of the Act, need not be recorded.

The privilege which this clause confers, is validity against *singular successors*, and nothing more. Certain written leases, not being protected by the Act 1449, c. 17, are only effectual against the granter and his heirs. They are effectual as personal contracts, but confer no right effectual against singular successors. The nature of such leases generally is thus stated by Mr Brodie, II. Stan. ix. 43, Note *a*, p. 369:—

As it is competent to every one to come under any legal obligations he deems fit, so he may grant tacks which shall be obligatory on him and his heirs, etc., upon any terms, whether as to rent or duration, that he thinks proper. A tack for an illusory tack duty, or for services or any other return, or in payment of a debt, or as security, etc., or without an ish, is no less effectual against the granter and his heirs, than one for a full rent and of moderate length.—*Carruthers v. Irvine*, 23d January 1717, p. 15195; Factor on sequestrated estate of Auchinbreck, 11th Feb. 1748. *Walpole and Alison*, 16th Feb. 1780, p. 16249.

The following leases, being valid against the grantor and his heirs, will (if registerable) be valid against singular successors on being recorded :—

Leases on which no possession followed.

Leases of indefinite duration, provided it is for thirty-one years at least.

Perpetual leases.

Leases in which the rent is elusory.

Leases for services.

Leases in security.

2. The next effect of registration is, that it completes the tenant's right, and is *equivalent to possession*.

Sec. 16 provides that—

The registration of all such leases, assignments, assignments in security, translations, adjudications, writs of acknowledgment, and notarial instruments, as aforesaid, in manner herein provided, shall complete the right under the same respectively, to the effect of establishing a preference in virtue thereof as effectually as if the grantor, or party in his right, had entered into the actual possession of the subjects leased under such writs respectively, at the date of registration thereof.

The preference here given to be distinguished from that mentioned in sec. 12.

Sec. 12 regulates the preferences of leases executed after the passing of the Act. As there may be a doubt raised as to whether it applies to all registerable leases, or to those only which have been recorded, and as the point is one of great importance, the terms of the clause must be closely observed :—

Sec. 12. All such leases executed after the passing of this Act, and all assignments, assignments in security of any such lease recorded as aforesaid, and translations thereof, and all adjudications of such leases recorded as aforesaid, or assignments in security, shall, on competition, be preferable, according to their dates of recording.

The clause seems to apply to recorded leases only, from the fact that the dates of recording are to regulate the preference, which necessarily implies that the competing leases have dates of recording. The answer, that a registerable lease, unrecorded, must be held to be recorded of a subsequent date to one already on the Register, is not conclusive, because there is no necessity for its being recorded at all. This view of the clause is corroborated by that part of sec. 2, which provides that, except for the purposes of the Act, it shall not be necessary to register, and that leases valid against singular successors—*i. e.*, valid as real rights—shall continue to be so, though not recorded. Now, if all registerable leases are to be postponed to those recorded, this provision is inoperative. The design of sec. 12 is to regulate the preferences of registered rights among themselves. Their preference, in competition with other rights, is regulated by sec. 16.

The direct effects of registration are—

1. Validity against singular successors.
2. Completeness of right, as if possession had followed at its date; and a corresponding preference in competition with other rights.
3. In leases dated after the Act, and deeds relating to such leases, preference among *recorded lease rights*, according to date of registration.

The indirect effects which result from these have next to be considered.

(*To be continued.*)

THE ABOLITION OF THE USURY LAWS.

WHAT IS LEGAL INTEREST?

THE regulation of interest or usury of money, either by prohibiting its exaction generally, or by limiting the amount or rate allowed to be exacted, has hitherto formed a subject of legislation in almost every known code. Both of these kinds of regulation have, at successive epochs, formed part of our own system,—the former under the influence of the Canon Law, and the latter in statutes passed from time to time since the Reformation.

It may be explained, that the radical signification of the words *interest* and *usury*, as applied to money, was originally, and is substantially the same, namely, the payment for the use or forbearance of money lent or due. Dr Adam Smith defines interest to be “the compensation which the borrower pays to the lender for the profit which he has an opportunity of making by use of the money;” but this is a very special definition, and we prefer the more general one, as including not only interest arising under contract, either express or implied, but also as including interest chargeable or leviable, *nomine damni*, on payments delayed or unfulfilled. In the course of time, the word *interest*, in the administration of our law, and with the recognition of the Legislature, came to signify the legal or permitted rate of payment, in contra-distinction to the term *usury*, as signifying an excessive or illegal rate.

The previous separate measures of the English and Scottish Parliaments were ultimately consolidated, or rather superseded, by the well-known statute of Queen Anne (12 Ann. Sess. 2, ch. 16), applicable to the whole of Great Britain. By this statute, it was declared, that no person should take, for loan of any monies, wares, etc., above the value of L.5, for the forbearance of L.100 for a year, under penalty of forfeiting treble the value of the monies and other things lent. The effect of this enactment, as applied by the courts of law, was practically to fix five per cent. as the legal and universal rate of interest, where no other rate was stipulated; and for nearly a century and a half, that rate, as the legal maximum, was never exceeded. Through all the vicissitudes of rebellion at home, and wars of unparalleled magnitude abroad,—of enormously increased national taxation and debt,—of depreciated paper currency,—and, withal, of commercial enterprise previously unexampled, the operation of this

law remained unchanged. At length, by the Act 3 and 4 Will. IV., ch. 98, passed in 1834, the point of the wedge which was to overturn the principle itself was introduced. It was then enacted that bills and promissory notes, not having more than three months to run, should be exempted from the prohibitions of the usury laws. This Act was renewed from time to time by several other temporary Acts, and extended to bills and promissory notes having a currency of not more than twelve months. The last of these Acts was the Act 13 and 14 Vict., ch. 56, which provided that, until the 1st of January 1856, bills and promissory notes for sums exceeding L.10, and having a currency of not more than twelve months to run, and contracts of loan not upon the security of real property, should be exempted from the operation of the usury laws.

Matters did not continue long upon the exceptional footing introduced by these statutes. The prevailing doctrines of free trade were considered as applicable to commerce in money as to commerce in commodities; and, finally, an Act was passed in 1854 (17 and 18 Vict., ch. 90), by which, in the most sweeping and unqualified terms, all the previous statutes, and, as if to include the principles of the common law itself, in so far as adverse to usury, in the abolition, "*all existing laws against usury*" were repealed,—we say, "*all existing laws against usury were repealed*," because we believe such to have been the object of the statute. The manner in which we endeavour to spell out that meaning from the verbiage of the Act shall appear afterwards.

The direct object of the new Act, in so far as it was intended to remove all disability to stipulate unreservedly for any amount of interest, or return for the use of money, we may hold to be accomplished; but in regard to interest to be exacted or awarded in the absence of express contract, and indeed in regard to every contract, express or implied, made since the passing of the Act, and to be hereafter made, in which the precise rate of interest shall not be numerically defined, we apprehend that this Act has completely unsettled the grounds of practice existing at the period of its passing, and has not established any distinct or clear regulation for the future, but very much the contrary.

It may be observed, that the term "legal interest" is not a term originally introduced or defined by statute. It had, however, obtained a meaning, even in legal practice; but its meaning was rather conventional and popular than statutory. There is no statute which enacts that five per cent. shall be held to be "legal interest;" but, on the other hand, there is the statute of Queen Anne, referred to above, which enacted that any rate exceeding five per cent. should be illegal. Hence five per cent., being, since the year 1714, the highest rate of interest which could be legally exacted or awarded, and, as such, being also the rate in use to be awarded *nomine damni* by the courts of law, came to be considered, as is remarked by Lord St Leonards, in a recent work (Handbook on Property Law, p. 88), the "natural rate of interest," and to be denominated, in our legal

and ordinary language, "legal or lawful interest." The phrase came to be adopted with that import in the most solemn and formal deeds, and in the forms of process, and to be recognised in various statutes as technically and specifically signifying, in such cases, the rate of L.5 per centum per annum. Custom has habituated us to its use in that signification; and although, in the case of *Gordon v. Howden*, 9th Feb. 1853, the Lord President is reported to have stated that the term "legal interest" did not necessarily signify the highest legal rate of five per cent., his Lordship, in one sense, simply enunciated a truism, which, however, might otherwise have been in danger of being overlooked. But practice remained the same,—use and convenience had appropriated the phrase; conveyancers made out their bonds for "legal interest," practitioners concluded in their summonses for payment, and extractors issued their warrants for recovery of "legal interest," as before." The term, "natural child," does not mean that no other children are natural. We know what it means. In the same way, the term, "legal interest," did not mean that no other rate of interest than five per cent. was legal. Still, *per se*, the term, "legal interest," used technically, did for many years, and until the passing of the Act of 1854, practically signify five per cent. That, however, is now all changed. All existing laws against usury are abolished. Every rate of interest being therefore now equally legal, and equally prestable in contract or in execution, we do not see that, without positive enactment or regulation, the peculiar application of the term, "legal interest," as synonymous with five per cent. interest, can be longer maintained or vindicated. The phrase may, by force of habit or tradition, for sometime continue to be used in that signification, as young brides recently married are apt occasionally to use their maiden names for sometime afterwards, but it is no longer appropriate or correct to do so. For the sake of commercial and legal convenience, we think it is to be regretted that the Legislature have not enacted a rate of interest, either fixed or fluctuating, as may be thought expedient, to be held, in all cases where no express stipulation is made, as properly and distinctly "legal interest;" and we shall indicate, before the close of this article, what we desiderate on this point.

In the meantime we turn to the examination of the statute of 1854. The purport of the first clause is to the effect we have mentioned,—namely, the abolition of all the existing statutes, and of all existing laws against usury. We conceive we are right in stating that this is the purport of the clause; but, in doing so, we take leave to notice the language in which this is conveyed as an instance— which we would be glad to be able to say was a singular one, either in our legislation generally, or in this measure in particular— of the verbal inaccuracy which has prevailed in the framing of it. The words of clause 1st are: "The several Acts, and parts of Acts, made in the Parliaments of England and Scotland, Great Britain and Ireland, mentioned in the schedule hereto, and all existing

laws against usury, *shall* be repealed." This is the whole clause. Now, what is the real meaning of the words, "*shall* be repealed," as here used? If it be that such repeal was to take place at some future time, the sentence is incomplete, no such future time being mentioned. If it be that the repeal was immediate, the terms used are ungrammatical and incorrect. The clause should, in that case, have run in these terms, viz., "All existing laws against usury are *hereby* repealed." We do not wish to be hypercritical; but we think we are entitled to expect, even in Acts of Parliament, some degree of regard to the ordinary rules of construction.

The second clause of the Act contains the ordinary and proper provision, to the effect that transactions entered into and liabilities incurred previously to the passing of the Act, are not to be affected by it.

But what shall we say to the third clause? We must produce it bodily, for we find ourselves unable to give any idea of it from description. It enacts that, "Where interest is now payable upon any contract, express or implied, for payment of the legal or current rate of interest, or where, upon any debt or sum of money, interest is now payable by any rule of law, the same rate of interest shall be recoverable, as if this Act had not been passed." These are the terms of this part of the statute. If we read the words, "where interest is now payable," in their ordinary signification,—namely, as applying to interest payable or current upon contracts existing at the date of the Act,—clause third amounts simply to a repetition of clause second. Upon that supposition, therefore, we get no further. We shall take another supposition; and, as the framers of this Act seem to have had rather peculiar ideas of verbal inflection, we hope the hypothesis we are about to suggest will not be considered a violent one. We have already had an instance, in the first clause of this Act, of the future tense being used by them in the signification of the present. Let us assume, in this clause, that they have used the present tense in the signification of the future, and that, by the terms, "where interest *is now* payable," they really meant to have said, "where interest *shall in future become* payable." We do not say that we are entitled to stand upon this supposition; but, unless such a hypothesis be admissible as a solution of the purport of clause third, the language of that clause, in its literal signification, does not carry us a single step beyond what is already provided for in clause second. Let us take the first limb of clause third, as if expressed in terms of the supposition we have ventured to make. It would run thus: "Where interest *shall in future become* payable upon any contract, express or implied, for payment of the legal or current rate of interest, the same rate of interest shall be recoverable, as if this Act had not been passed." Does this mean that, if payment of legal or current interest be expressed or implied in the contract, the statute of Anne is to be held as re-enacted, or, in other words, that if a creditor bargain for current interest, and the actual current rate of interest should be eight or ten per cent.,

that he is not to be entitled to recover more than five? Yet the Act says expressly, that if a contract be made for payment of the current rate of interest, the same rate of interest shall be recoverable, as if the Act of 1854 had not been passed. If the Act of 1854 had not been passed, the Act of Queen Anne would have remained in force; and this amounts to saying that, in such a case, whatever such current rate of interest may actually be, the creditor shall not be entitled to recover any higher rate than was allowed by the Act of Queen Anne, which is, in effect, reviving the operation of the measure which it is the object of the new Act to abolish. Let us now take the other limb of the clause, and treat it in a similar manner, by substituting the future tense instead of the present, in regard to the period of its application. It would then run thus: "Where, upon any debt or sum of money, interest *shall in future become* payable by any rule of law, the same rate of interest shall be recoverable, as if this Act had not been passed." An expression new to the law of Scotland is used here. We have no such phrase as "Rule of Law." We have Acts of the Legislature, and Acts of Sederunt of the Court, and we have the decisions of the Court, and the practice of the profession, and the custom of the country; but we have no such term as "Rule of Law" in our nomenclature. But no matter. We shall suppose this term, "Rule of Law," to include the force of all these; and, as the decisions and practice, as existing at the passing of the statute of 1854, were founded on that of Queen Anne, we have that statute in this respect practically re-enacted, or we have nothing. We shall not attempt to resolve these alternatives. The former is at variance with the whole scope and design of the new Act, while the latter renders this part of the clause ineffective. The result of the whole is, that clause third, even stilted out, as we have attempted to do, with suppositions in aid of its apparent meaning, is, in so far as not obscure and tautological, self-contradictory and nugatory. There is an ingenious theory, that the round towers of Ireland were erected in a former age to puzzle future antiquarians. We cannot but think that the framers of the present Act have proceeded on a similar speculation in regard to lawyers; and we anticipate that, in its interpretation, some pleasant little *nodi* are likely to arise, which it will tax all their ingenuity to solve.

The new Act has been successful in one thing. It has created utter uncertainty and confusion on points on which, for many years, the operation of the law was settled and recognised; and we think it has been rendered indispensable that there should now be introduced, by authority of the Legislature, some fixed or standard rate of interest for the guidance of our courts of law for the future, in awarding or adjudging interest on past due obligations and judgment debts. Interest, as awarded by a judge, is truly awarded as damage; and amount or rate of damage is a matter which, according to the present theory of jurisprudence, is for the determination of a jury, not of a judge. In the absence of positive enactment or regulation, the

award of damage or interest must be special in each case. Anciently, the law was so applied. Thus we find Lord Stair laying down (Inst. i. 17, 16), before the act of Queen Anne, and of course before the introduction of jury trial in civil matters, "In awarding interests (*nomine damni*), it is in the arbitrement of the judge to ponder all circumstances, and accordingly modify the value, either as at the time of delay or citation, liti-contation, or sentence." The maximum value which could be so awarded was, of course, controlled by the usury statutes in force for the time. This view continued to be acted upon until after the passing of the Act of Queen Anne. But that Act did not lay down any rule, or affect the principle of judgment which existed before. It only laid down a limit, which was found a convenient one, and so reasonable for the time, that a habit was formed of awarding to the creditor, as the reparation for his loss, what was then considered the ordinary legal profits of money, or what it might be necessary for the creditor to pay to obtain the use of the same amount of funds from another source.—(Bell's Comm. i. p. 646.) These ordinary legal profits were then assumed to be, and could not exceed, five per cent. The limit of Queen Anne's Act, which gave a foundation for this view, is now taken away. The "arbitrement" of the judge in matters of fact, which then entitled him to assume such a foundation for his views, and to modify interest according to his own opinion, is also taken away, and we are now left entirely without any practical direction whatever. Our present position may be illustrated in this way. Since the passing of the new Act, it is perfectly competent, in suing for a claim of debt incurred since its passing, to conclude for eight or ten per cent., or any other rate of interest, both retrospectively and prospectively. That is to say, it is competent, for example, to conclude for ten per cent. from the time when the debt fell due up till the date of judgment, *and in time coming thereafter until payment be made*. Now, we do not see that a judge, in the present state of the law, is entitled, at his own hand, without proof in each as to the state of the money market, and without the verdict of a jury on such proof, to discern for any such rate of interest as to the past; and we have still more difficulty in seeing how even the judge and jury between them can, by anticipation, fix, what is equally essential practically, the rate of interest to be paid for the future, namely, for the period betwixt the date of the judgment and its fulfilment, which may be months or years, according to circumstances. Neither do we see, that what has hitherto been understood under the name of interest, can now be assumed to be the sole measure of damage to the creditor. He loses that at least, but he may lose much more. He may not possess the credit, or be able to find the security, necessary to enable him to replace the funds which he has failed to obtain from his debtor, and by being thereby rendered unable to fulfil his own engagements, may suffer loss far exceeding what mere interest may repay; and the limitation of the usury laws being

removed, it does not appear why the actual damage arising from the non-payment of money should not now be held a relevant claim. Questions on these points will soon arise in almost every action for debt. Let us suppose that the recent high rates of interest had continued, and that, on a past due bill discounted at, say, ten per cent., an action were brought concluding for payment of the principal sum, and for interest at, say, the like rate of ten per cent., from the date of the dishonour and until payment. The latter conclusions are truly conclusions of damages. To a certain extent, they would fall within the province of a jury; but, as a whole, we do not at present see how they could be competently disposed of at all. Let us suppose, on the other hand, that interest is to fall to two or three per cent., and that actions are brought for debts arising since the date of the statute, in regard to which no rate of interest was expressed in the contract, and no proof exists to show that any particular rate more than another was implied or contemplated. Is the creditor, in such a case, now entitled to insist for even five per cent.; and is the court, at its own hand, entitled to award such a rate, and that not merely up to the date of judgment, but continuously afterwards? We doubt very much if it be in the power of the court to do so. But if the rate of interest is ever to become a point of discussion in each case, much more if the intervention of juries has to be called for, and conclusions for special damage be also competent, the inconvenience will evidently become intolerable. The extent of damages for non-payment of money is a point so obviously requiring regulation, that it should have been foreseen and provided against. It is one on which, in the history of jurisprudence, difficulties have in various countries been already experienced.¹ It has been foreseen and provided against in others. The French jurists are much fuller and clearer than our own on this topic. Domat, B. iii. 75, says—"The damages for non-payment of money are all uniform, and fixed by the law to a certain portion of the sum that is due for the space of a year, and proportionally for a longer or shorter time." . . . "Among all the causes which may give occasion to a reparation of damages, there is none so frequent as the default of paying a sum of money that is due, and there is likewise none from whence there arises so great a variety of damages to be repaired; so that, if every creditor had a right to have the damage estimated which he may suffer for want of the money due to him, each demand of payment would be attended with an infinite number of discussions of the different damages which the creditors might allege they had sustained. Had there

¹ Mr Robert Hannay, in his defence of the Usury Laws (Edinburgh, 1823), says—"The effects of leaving usury or interest to be restrained by equity, was tried in Italy, and the consequences were endless lawsuits, expensive proofs, exposure of the secrets and profits of particular traders, and of the affairs and circumstances of private men, until the Courts were compelled to fix rules for themselves, afterwards confirmed by declaratory laws."

been no other cause for fixing by law on uniform reparation for all the sorts of damages which may arise from the non-payment of sums of money, besides the consideration of retrenching this infinite multitude of different liquidations and lawsuits which would follow thereupon, we could not well be without such a regulation." And Pothier, on the same subject (Pothier on Obligations, Part i. ch. 2, art. 3, sec. 169), says—"As to the different damages and interests which arise from delay in satisfying payment of money, as it is equally difficult to foresee and prove them, it has been necessary to regulate them, by a kind of forfeit, by some fixed standard; and this is done by fixing the interest of the sum due at the rates prescribed by the ordonnances which begin to run against the debtor from the day of making a judicial demand until the time of payment, these interests being the common price of the legitimate profit which the creditor might have derived from the sum due to him, if it had been paid." In England, where the system of jury trial in civil matters has attained much greater maturity than in this country, the rate of interest to be allowed up to the date of trial is, by statute (3 and 4 Will. 4, ch. 42, sec. 28 and 29), expressly referred to the jury. The rate of interest payable after judgment is also expressly fixed by the statute 1 and 2 Vict., ch. 110, sec. 17, which enacts that every judgment debt shall carry interest at the rate of four per cent., from the time of entering up the judgment until the same shall be satisfied. In Scotland, the difficulties and inconvenience stand as we have endeavoured to point out; and though we do not propose to make the terms of either of these English measures the model for amendment of our own difficulties, we think they can only be obviated in a similar manner, namely, by legislative enactment, as it is not in the power of the Court of Session itself to make any general regulation on such points. We think it cannot be denied that such an enactment has now become necessary. There may be a jealousy of legislative interference with the operations of trade; but we submit that there is a wide distinction, which we do not think is sufficiently regarded, betwixt interference which facilitates, and that which impedes or restrains, the ordinary transactions of life. The latter belongs to a school of economy now exploded; but the former—as is exemplified in the statutes of prescription, the insolvency laws, the statutes regulating weights and measures, etc.—is from time to time of the highest utility and advantage. And as Mr Mill, in his *Political Economy*, adds, many matters are provided for by positive law, "not because it is of much consequence in what way they are determined, but in order that they may be determined somehow; and there may be no question on the subject."—(Mill's *Political Economy*, B. 5, ch. 1, sec. 2.) This is precisely the sort of legislative regulation we say that is required in the present case. But we may derive from the Act itself under discussion an example of not merely regulative, but even restrictive legislation, in the clause which, as it appears to us very inconsistently with its own principles, it

contains, upholding the restrictions on pawnbrokers. It may be impossible, with a due regard to the fluctuations in the value of money, to exact a rigidly fixed rate of interest to be imposed or adjudged, as has been heretofore done in all cases, as the legal rate; but we think that an interest average, to be struck yearly or half-yearly from returns by banks and insurance companies, or from some equally authentic source, might be introduced with advantage, as a criterion or legal standard for the regulation of courts.

The suggestion of a legal standard of interest, or the introduction of a determinate rate or rates, which, whether fixed or fluctuating, shall be known technically and judicially as legal interest, is advocated in the meantime solely with a view to administrative convenience,—that is to say, in order to obtain for the courts of law a common rule or standard in actions and diligences for ordinary debts, and to save the necessity of making the rate of interest to be allowed, or authorised to be recovered, a subject of trial and judgment in each case, which would be necessary if it be left as an open question. We need scarcely here repeat what we have already said in another shape, that the courts of law have no power to lay down any rule themselves which might affect the rights of parties in such a matter. Their well-known function is *jus dicere, non jus dare*.

Apart from the particular terms of the new statute, we do not propose to discuss the policy of the usury laws, or whether or not it would be expedient that the Legislature should, from time to time, fix a maximum rate of interest, or institute a self-adjusting standard by which such a maximum might be regulated; but we do think the sweeping change introduced by this statute to be inconsiderate, and we doubt if the expediency or in expediency of usury laws, as a question of principle, is one that can yet be looked upon as finally set at rest. We are not favourable to the maintenance of restrictions which fetter dealing in any way, but money is a highly exceptional commodity. Being itself the symbol of all other wealth, and the means and instrument of all other commerce, it represents in the hands of its possessors the multiplication of almost every other material influence; while the exigencies of those who want it involve the deprivation of all their other means and resources, including, perhaps, that of personal liberty itself. It is a principle of ordinary commerce, that all transactions should be for the benefit of both parties. If they are not, there is an equitable presumption against their validity. If fraud transpire to have been practised, there is an end of them; but in usury the very exigencies of the borrower are made a leverage for his own ruin. He is conscious of the extortion practised on him; he sees and knows the imposition; yet he is constrained to become a party to the fraud upon himself, and cannot and dare not complain. The experience of all nations has shown the temptation to abuse the power which capital wields to be too strong to be resisted, and that the tendency on the part of money-lenders to over-reaching and extortion has universally rendered necessary the protection of positive law against their rapacity. A memorable example is afforded in the

case of France. When, upon the persuasion of Turgot, the usury laws of that country were abolished by the National Convention in 1793, the effects were found so disastrous and fatal, that twenty-three days afterwards they were re-enacted. It is a mistake to suppose that the prohibition of usury was introduced for the first time in the Mosaic code, or that the prohibitions against it in all other codes are derived from that one. On the contrary, the experience of its abuses is as old as civil history itself. The Egyptians had laws against usury before the Mosaic code was written; and there is reason to believe that the Hebrew lawgiver formed his views on the subject from them. Laws against usury are said, though we are aware that this is a controverted point, to have been enacted by Solon at Athens; but, at all events, we know that the abuses of usury in that state were such, that he was obliged to make a wholesale reduction of the liabilities of the indebted. We know also that, independently of Jewish influence, usury was also prohibited among the Romans. The introduction of laws against usury, as contradistinguished from interest, into our own code, also arose entirely from the necessity of protection against the rapacity of money-lenders. On the abolition at the Reformation of the Canon Law, which prohibited interest altogether (although the Canonists themselves were most fertile in the contrivance of annualrents, wadsets, and other devices for contravening their own prohibitions), commerce in money, as regards lending at interest, became entirely free, and continued so until the crushing extortion of usurers or "okerers" gave occasion for the passing in Scotland of the Act of James VI. in 1587, restricting lawful interest to ten in the hundred. Similar causes in England had previously given occasion for the Act of Henry VIII. in 1546 against usury. These restrictions to rates, enacted in various statutes from time to time, and finally embodied in the Act of Queen Anne, continued in force until the Act of 1854, by which they have now been repealed. The public are again left without protection (except under the pawnbroking Acts relative to small sums); and, for all that now appears, any rate of interest, 50 per cent., 100 per cent., or any amount whatever, may be stipulated, and must be recognised as valid in law. We need not illustrate any of the thousand and one circumstances in which an unscrupulous creditor, with his feet on his debtor's neck, may exact, and the latter, even knowing that he is defrauded, concede, the most extravagant terms; yet, even in such a case, under the new statute, not only must a claim so arising be held as just and lawful against the debtor himself, but also in competition on the debtor's estate, with and at the expense of his other fair and *bona fide* creditors; whereby the consequences may, without any means of redress, be visited upon them, of the most imprudent acts of, perhaps, a very imprudent or unprincipled debtor in his greatest emergencies. We cannot think it judicious thus to put a premium on rapacious extortion. Every human legislation hitherto has sought to repress it. The Act of Parliament under review practically encourages it. Without going quite the length of Cato. who

looked upon usury in the same light as murder, there is no doubt that hitherto it has been regarded, on the pages of our institutional writers, as a crime both at common law and under statute. This Act, by abolishing *every* prohibition against it, both under the statutes and the common law, makes every kind of extortion, under the name of interest or usury, legal, and unchallengeable on any ground whatever.

We do not now contend for a revival of penal legislation in a matter not accompanied by violence or outrage, and so difficult to be defined; but we do humbly protest against being deprived of all redress under the common law from gross extortion, however deliberate, iniquitous, and unjust. We say so not merely in the interest of the public generally, but of our most respected banking companies and capitalists themselves, who would disdain improper advantages, but who will undoubtedly become exposed to have the assets of their debtors carried off by more unscrupulous parties. Had the Legislature merely rescinded the statutes against usury, the grounds of our protest might have been more debateable; but, not content with that, they have deprived us of the equities which our common law affords to all who are wronged; they have abolished all laws whatever against usury; they have practically legalised extortion. In vain will it be attempted to uphold professional morality by limiting practitioners to their regulated fees, and disallowing gratuities, if the rates of interest which they may charge their clients on cash advances are to be unlimited. We cannot suppose that any such effect as this was intended. There may be, in this respect, as in so many others, blundering on the part of the framers of the Act, or there may not; but, in the meantime, judges and the public must take the words of the statute as they stand,—“All existing laws against usury shall be repealed;” *ergo*—no rate of usury is unlawful; *ergo*—any, or every rate of usury, however extortionate, is lawful, and as such, must be supported by the law.

This Act was passed, as we have mentioned, in 1854; but rates of interest having, until recently, continued moderate, attention has not been attracted to its operation. The Act seems, in some respects, indeed, to have hitherto been dormant. The framers of the Bankruptcy Act of 1856 seem to have been still pervaded by the old ideas on the subject of legal interest; and in the provisions for equalising the rights of parties in ranking for dividends (sec. 52) we find the term “legal interest,” which has ceased to have any fixed signification, is still used. We think it is now desirable to avoid the use of phraseology of this kind; and we venture to recommend to practitioners, instead of using in any case the terms, “legal or lawful interest,” to specify the precise rate which is intended. We are aware of the *obiter* in a recent case (*Marder or Smith v. Barlas*, 14th Jan. 1857); but in that case the point was not fairly before the Court, and the questions at issue had arisen before the date of the present Act.

We desiderate, therefore, for practical convenience, a standard of legal interest to be provided or sanctioned by Parliament. We think also, with Lord Bacon, that it would still be desirable that the law

should afford means whereby "the tooth of usury may be grinded,"—whereby, in short, the crime may be repressed without fair dealing being restrained; and we augur that it may yet be found necessary, not on canonical or pragmatismal, but on just grounds, to establish, as a maximum of allowable interest, a certain measure above the current bank or market rate, to exceed which, shall be held illegal; or, at any rate, that it will be found necessary to restore to the common law such inherent remedies as it may possess against usury carried to unjust excess; but we trust that, at whatever time the subject may again come under the consideration of the Legislature, any measure that may be passed will be expressed in language less inaccurate and perplexing than that of the statute which we have now attempted to discuss.

Review.

What is the proper Vacation?—We have now had some experience of the Court of Session Act of 1857; but at present we mean merely, in passing, to suggest, now that Parliament is about to meet, that an alteration should be made in the enactments as to Vacations. We particularly refer to the week taken from the Spring Vacation, in regard to which there is a general concurrence of opinion, that it should be restored. That vacation is important in many respects, as it is the busy season in London, and Scotch counsel and agents are then enabled, without loss of their Scotch practice, to attend to business before both Houses of Parliament. The week—or three weeks—might, with great public advantage, be made up from the long vacation. By the beginning, or at least by the middle of October, all Edinburgh families have returned to town, schools are opened, and the busy world has begun its labours for another year. It seems hard, in those circumstances, that lawyers should be made to endure a whole month of enforced idleness, which might be profitably spent in getting through the business of the country. In any event, the twelve days in November, when the Lords Ordinaries sat, will surely be restored. A great quantity of work was quietly gone through during these twelve days, which could not be so well accomplished when the whole Court has met.

Extinction of Cases in the Sheriff Court by Delay.—We merely note the fact, for the information of our readers in the country, that opinions have been given, to the effect that a country agent is liable in damages to his client, if, by delay to carry on the action during any period of six months, it "stands dismissed," by virtue of the 15th section of the Sheriff Court Act, 16 and 17 Vict., cap. 80. Under that section, the action falls entirely by such delay; and it may happen that an expensive proof may thus be rendered utterly useless. Pleas of prescription, moreover, may, by the dismissal of the action, be pleadable, which might not be so if the action had gone

on. An incompetent or an inept process does not interrupt the running of prescription. Thus the agent may be the cause of losing to his client, not merely the whole expense incurred, but the whole debt itself. With such serious responsibilities hanging over their heads, it becomes our country friends to bestow more attention than is often done to the progress of their cases. Some unfortunate brother will one day find himself in the Jury Court; and the whole savings of a lifetime may be swept away, to repair the damage caused by a moment of inattention.

The Defence of Irrelevancy.—The Lord President has recently called attention to one of the most crying abuses of the Scotch system of pleading, viz., the plea by a defender that an action is not relevant. No lawyer who draws a defence for a defender who wishes delay omits to state, as his first plea in law, the well-worn formula,—“*The pursuer has not set forth facts and averments relevant and sufficient to entitle him to decree, as concluded for.*” So potent is this plea, that it procures a delay of at least two years before the merits of the case are inquired into. When the record is closed, the pursuer, instead of at once getting the case set down for trial, is obliged to submit to the case being put at the bottom of the debate roll of the Lord Ordinary, where it must wait its turn—say a year—in order that parties may debate whether the action is relevant. After the Lord Ordinary has pronounced judgment upon the plea, the case is taken to the Inner House—is sent to the end of the long roll—and appears at some future day for debate (after another year), in the Inner House. Both the Inner and Outer House Judges having decided for the relevancy, the pursuer gets to trial at a period when he has forgotten about the case, and when his witnesses are dead or in Australia. Nothing, therefore, can be more serviceable to the ends of justice than the remarks of the Lord President in a recent case (not the first time, however, in which he has so expressed himself), condemnatory of the system. But unless the practice of the First Division be followed by the Outer House Judges, we advance but little way to a remedy for this great grievance. No doubt there are cases where an action might safely be disposed of upon the ground of irrelevancy at once,—such as, if a *second* son, designing himself such, claimed, in competition with his elder brother, to succeed, in defiance of the law of primogeniture, to his father's estate. But unless it be something as clear as this, the true course is, on the closing of the record, at once to order the issue, and leave all questions of law till the facts are ascertained. There would be no injustice in allowing this plea, if it were permitted under the same penalty as in England, where it is called a *Demurrer*. The party demurring admits, *not arguendi gratia*, but *positively*, the truth of the opponent's allegations. Therefore, if the opinion of the Court be against the demurrer, judgment at once passes upon the merits of the cause in favour of the pursuer. Let this be made the condition of the plea of *non relevant* Scotland, and it will soon disappear. Until, however, this is

made law, the lieges must trust to the good sense and firmness of the Outer House Judges in discriminating between the cases where the plea might be safely heard and judgment given upon it, and the far more numerous class where it is put on record purely for the purpose of delay.

Inferior Court Records.—A correspondent, styling himself “Juridicus Rusticus,” whom we take to be some sheriff-substitute in a remote county, directs attention to the inaccuracies which frequently appear in the records of the inferior courts, as they are presented for review in the Supreme Court. He states, “The writer could point out a case, now a leading authority, where one of the findings of the sheriff-substitute was printed in terms quite the reverse of the original. On this a plea in law was taken, and a most grave debate followed, on a state of facts which was purely imaginary. If the original had been referred to, it would have been found that the whole basis of the argument was a mere chimera—the creation of the clerk or the printer.” Such errors necessarily escape attention in Edinburgh, but it will be seen at once that they are very likely to occur. The printing of the record is entirely an *ex parte* proceeding: there is no official or independent scrutiny. “The only guarantee for accuracy is the mutual check of agents on each other. The records, especially of local courts, are repeatedly copied over, and the final print may be taken from the last of the series—perhaps the tenth transcript—the work of some careless apprentice probably. The most important duty of revising the proof is, in like manner, intrusted generally to inexperienced hands. In consequence of this total absence of all supervision,” our correspondent says, “he could furnish a list of *errata* of the most amusing character. This point is the more important now, that, in reviewing the decisions of sheriffs, the evidence is printed from the notes of the sheriff-substitutes, some of whom are notorious for cacography. The change or omission of a single word may alter the whole testimony, and, if undetected, lead to gross injustice. In such cases, it should be required, by Act of Sederunt, that the printed notes be authenticated by the sheriff who took the proof, or by some official of the local court.”

The Eaglesham Poisoning Case.—Peter Walker, *alias* John Thomson, the Eaglesham poisoner, underwent the extreme punishment of the law at Paisley on the 14th ult. The evidence was clear, the jury were unanimous, and the panel made confession of his guilt. No interest attaches to the case as one of mystery, for all its material facts are known; and the story, fearful as it is, can scarcely be said to have any of those dramatic elements which, in many cases of poisoning, have taken a powerful hold over the imagination and the sympathy of the public. Still, the trial is not without its points of interest in a medical, psychological, and legal point of view.

The medical facts of Agnes Montgomery’s death are made the

subject of some careful and intelligent observations, serving as a preface to Mr Hugh Cowan's report of the trial. One of these only we shall notice. The evidence does not so sharply define the interval between the administration of the poison and the death as Mr Cowan assumes. Quite consistently with that evidence, we may hold the dose as given at ten minutes past five on the afternoon of Sunday the 13th September, and the death as occurring at ten minutes before six. The only appeal to the clock was made by John Watson; and that was neither at the beginning nor at the end, but at some time in the middle of that interval. All the testimony about its duration is qualified by the terms, "about," or "it would be." We cannot, therefore, hold it as proved that the illness was greatly longer than the average; or that there is any difficulty about it which the immediate vomiting of the poor sufferer, and the absence of any proper treatment for her recovery, is not adequate to solve. The medical interest of the case lies here, that, being the story of an ascertained death by prussic acid, it cannot fail to throw light upon any subsequent case of surmised death by prussic acid, in which the evidence of administration may be more doubtful.

Psychologically considered, the story is strange by the absence of the usual incitements to murder. Walker never manifested any hatred towards the Masons, whom he also tried to kill by poison, and had no conceivable interest in their death. The evidence of vindictive feelings or covetous hopes on his part, likely to be gratified by Agnes Montgomery's murder, was of the weakest kind. His self-contradictory statements, after the trial, throw no additional light on the matter. Our own impression is, that he was actuated by a morbid desire of mastery over the lives of others; a power which, as he inferred from Madeleine Smith's acquittal, might be wielded with considerable chances of impunity. He poisoned Agnes Montgomery and the Masons as the Marchioness de Brinvilliers poisoned the sick in the Hôtel-Dieu. To hold the lives of others in one's hand, is an idea which might very well have the same fascination for a profligate marchioness and for a returned convict.

Nothing is more certain than the influence which Madeleine Smith's trial exercised upon Peter Walker. Even the pretext which he alleged to the witness Ferguson as his motive for buying poison, seems suggested by the Blythswood Square tragedy. Madeleine Smith, we all know, washed her face with arsenic. Peter Walker used prussic acid as a hair dye. Had he escaped his righteous doom, and been socially better than a convict tailor, some sympathising journalist would no doubt have discovered that his substitute for Persian liquid, though unknown to the general public, was in frequent, though secret, use among the initiated.

Not without surprise we find that the following testimony was allowed to go to the jury as evidence of malice, on the part of the panel, against Agnes Montgomery:—

"39. *William King, weaver in Eaglesham.*—I recollect Agnes' death. One day before, I was in the Cross Keys public-house with the prisoner. He told

me he was at variance with some parties, but would do for the b—— yet. I understood him to allude to some of James Watson's people (Watson was Agnes' brother-in-law). This would be a month, I think, before Agnes' death."

On what grounds did the witness understand these words as a threat against Agnes Montgomery? It depended on his answer to this question, whether his "understanding" was receivable as a rational conviction based on valid grounds of belief, or inadmissible as a worthless fancy of his own. But that testing question was not put.

One point more, the most important of any, remains to be noticed; our remaining space will not allow us to do so at any length. Janet Watson, an intelligent little girl, between three and four years of age, was in Agnes Montgomery's room, along with the prisoner, when the foul deed was done. She saw the poison given, and the victim fall. All this is ascertained fact. If the law had declared that the evidence of a young child is not, in any circumstances, receivable, the judge must have obeyed the law, by excluding her from the witness-box. But there is no such rule. As matter of discretion, the Lord Justice-Clerk refused to let the little girl tell the jury what she saw. It is another, and a totally different, question whether her subsequent statement to her mother was receivable as part of the mother's evidence; though the reported opinion strangely mixes up these two things together.—(See p. 41 of report.) Fortunately for the ends of justice, the circumstantial evidence was so strong as not to require the direct evidence of Janet Watson to make it convincing. So far as the Eaglesham case is concerned, it is a sterile vindication of constitutional principle which we are making. But there is always danger that such decisions may be followed. We have room here only to affirm, that the whole case ought to have gone to the jury; and that the judge had no power arbitrarily to withdraw any part of it from their consideration. The question, whether the proposed witness was trustworthy, was one peculiarly within their province, and not at all *in arbitrio judicis*. That precedents for this alleged discretionary power may be found in the dark times of our criminal jurisprudence, we have no difficulty in believing. Against its assertion and exercise in these days, we shall always be prepared with our humble but strenuous protest.

A London medical journal lately praised the prisoner's counsel for having abstained from those assertions of personal belief in the innocence of his client, so common on the south of the Tweed. It is right that our contemporary should know that the conduct of our friend Mr Moncrieff in this respect, is not an exception to our professional rule, but only an instance of it.

Fraudulent Bankruptcy.—The sudden abundance of money, and the rapid revival of confidence in commercial circles, are matters of general congratulation; but now that our difficulties begin to dis-

appear, it is to be hoped that the lessons they taught us, will not be forgotten with the occasion. A most rotten system of business has been exposed—business carried on without capital—supported by spurious bills—and the creditors property squandered in personal and domestic extravagance. However, the storm has cleared away, and the public mind is in a calmer mood for the discussion of the evils brought to light, and the remedies required. The reckless abuse which has been made of our Accommodation Bill system—the easy way in which sets of speculators draw upon each other—or, still worse, fabricate these documents, by affixing the names of fictitious acceptors, has been attended with the most disastrous consequences to commerce, and threatens, if unchecked, to be still more so in its results. It has been suggested, that some restriction should be placed upon the creation of bills for accommodation. Certainly, every bill should bear the names of a real creditor and a real debtor; and should be, in point of fact, what it purports to be on its face, “for value received;” but any change in the law is surrounded with difficulties of a very formidable description. The punishment of dishonest traders is another topic to which attention has, for some time, been directed; but, here the reform required is not in the law itself, but in its more vigorous execution. On this point, the law of Scotland is of a much more elastic nature than the law of England. In England, in order to make the fraudulent contraction of debt indictable, it is essential that credit be obtained after the exhibition of some false token, as it is called (1 R. Cr. 51); but, in Scotland, this is not necessary. The mere fact of a man ordering goods, when he knew he never would be able to pay for them, is quite sufficient to establish a case of fraud. The law was thus laid down by Lord Cockburn, in the case of Hall and others, 25th July 1849. (J. Shaw, 260.)—“It is not going into a shop and buying goods, without paying for them, that constitutes the crime; that is often done innocently, for a man may be unable to pay. But the crime here is, buying goods and procuring delivery, with the intention of not paying for them at the time. It was the alleged dishonest intent charged which constituted the offence; and that, if *proved*, was enough.” The law, as it stands, is thus as clear as any Act of Parliament could make it—and no statute is able to remove the difficulty which has always been experienced in such cases—the difficulty of the proof. Considering the disgraceful nature of the recent revelations before the Sheriff, a conviction or two would undoubtedly have the most salutary influence; and we are glad to find that we are not alone in this opinion, as appears from the following incident, at the close of an examination, in a very remarkable Glasgow case:—

Mr M’Nair, at this stage, addressed the Sheriff. He said he was a creditor for a considerable sum on the bankrupt’s estate. His Lordship must have observed conduct on the part of the bankrupt, which was scandalous and disgraceful in the extreme, and such as he (Mr M’Nair) hoped would never again be pursued. He submitted it for his Lordship’s consideration, whether he

would not be justified in drawing the attention of the Lord Advocate to the existing state of the bankruptcy laws, which made no distinction between an unfortunate bankrupt and a fraudulent one. He thought there should be a difference between the treatment of the two, and that a criminal bankrupt be handed over to the proper authorities for investigation into his conduct and punishment. It was high time, he thought, that such a distinction should be drawn.

The Sheriff expressed his concurrence in the remarks made on the expediency of having a different mode of treating the two classes of bankrupts; but he considered that Mr M'Nair was not accurately informed when he imagined that the present law of bankruptcy did not distinguish between the fraudulent and the unfortunate bankrupt. The fact was that fraudulent bankruptcy was punishable as a crime, but it was generally very difficult to obtain enough of evidence in such cases as would warrant a conviction. The suggestion which he would make on the subject was, that the Sheriffs should have the same power as the Commissioners of Bankruptcy in England possessed—then they could withhold a certificate to the bankrupt if they were not satisfied as to his honesty. In the present case, Mr M'Nair could, if he thought he had grounds, lay his case before the Procurator-Fiscal, and ask for a criminal prosecution, which would be granted if, on going over the evidence, the Lord Advocate saw that a conviction could be had. However, he (Sir A. Alison) would give the matter all his attention.

The Bankrupt here objected to the expressions used by Mr M'Nair. : He thought it was very improper for any one to speak of him as if he were a convicted criminal.

The Sheriff said he saw no reason for the Bankrupt's complaint. Commercial men were often so involved through speculation, that their conduct wore an ugly aspect, yet the parties might not be criminal. However, what occurred to him, particularly, as an element of fraud on the part of a bankrupt, was the fact of his buying goods on credit, at a time when he knew he was insolvent, and disposing of them for cash.

Abuse of Sequestration.—The easy process by which an insolvent may be disencumbered of his debts, by means of sequestration, is leading to an abuse to which the attention of the mercantile public should be directed. Sequestration is now not only cheap and speedy, but completely efficacious. A man without a particle of estate, real or personal, is, by its use, enabled to put all duns at defiance; and, accordingly, since the late Act came into operation, parties have betaken themselves to this remedy, who have no right to sequestration, and for whom sequestration was never intended. A man who has been hopelessly in debt for some years, who has not a shilling in the world—to whom, like the impecunious Swiveller, every street is closed—thinks he will give up business, and take a situation, or try his fortune in some other line, or remove to some other part of the country. His books are in the most hopeless confusion; so, before making his new venture, he commits them to the flames, and settles his accounts with all the world, by applying for sequestration. When the creditors meet, they find that there is nothing to sequesterate. His schedule only exhibits a dreary catalogue of bad debts. Such a person has no right to sequestration; his proper course is to apply for a cessio. Sequestration granted in such circumstances is a fraud upon the bankrupt law; and, accordingly, though every application is granted which is *ex facie* regular,

the Court has, in such cases, shown every disposition to grant a recall, if the creditors require it. The exercise of this power put a stop to the stream northwards of those English insolvents, who, unable to pass in London, attempted to smuggle themselves through the Gazette in Edinburgh; but, more recently, one or two parties, to whom no objection could be taken on the score of jurisdiction, have attempted to steal a march upon their creditors, in a still more ingenious manner. For example, the debtor is a bootmaker, living in Glasgow. He wants sequestration, and is apprehensive that his creditors will oppose. He goes down to some village in a neighbouring county—to Renfrew, or Bowling, or Barrhead—and opens a shop as a grocer or a tailor, over which he paints his name. In a week or two after, his creditors see that an application has been made for sequestration by Mr A——, grocer, Renfrew, or Mr B——, tailor, Bowling; but they never for one moment suspect that this is their man. A fraud of this kind was recently discovered, in the course of a discussion before Lord Mackenzie. The debtor had not a sixpence in the world; and the Lord Ordinary took occasion to direct attention to a clause in the bankruptcy statute, which seems generally to have escaped observation, and would, if put in operation, act as an effectual check on such reckless or fraudulent procedure as the above. It is sec. 168, and is one of the entirely new provisions of the late statute. It says, “It shall be competent for a majority in number and value of the creditors, at any meeting called for the purpose, after the election of the trustee, if it shall appear to them that the estate is not likely to yield free funds for division among the ordinary creditors, after payment of preferable debts and expenses, *beyond* L.100, to resolve that the bankrupt shall only be entitled to apply for and obtain a decree of cessio, and shall have no right to a discharge in the sequestration;” and then, if the resolution is confirmed on being reported to the Lord Ordinary or the Sheriff, it is further enacted, “The bankrupt shall have no right to a discharge in the sequestration, but shall be entitled to apply for a decree of cessio; and the Court shall have power to grant such decree in the sequestration, without requiring the bankrupt to bring a separate process; and in all other respects the sequestration shall be proceeded with in common form.” This clause fully carries out the policy of the bankrupt law, which is designed, not for the protection of profligacy, but as a remedy only for commercial misfortune.

The New Court of Probate and Court of Divorce.—During the past month, Sir Cresswell Cresswell took his seat in Westminster Hall, as the Judge of the New Court of Probate and the Court for Divorce and Matrimonial Causes. The appointment of so able a man to inaugurate the new system, is spoken of in terms of the most unqualified commendation. He will have to mould a mass of legal learning in ecclesiastical and civil law—form an entirely new practice—interpret two long statutes, every provision in which was

keenly debated, and many clauses in which were inserted by way of compromise—adapt the common-law rules evidence to inquiries hitherto conducted in a totally different manner—and settle all the conflicting difficulties which occur in private international law. Under the Divorce Act, the judges are the Lord Chancellor, the Lord Chief Justice of England, the Chief Justice of the Common Pleas, the Chief Baron, the Senior Puisne Judge of the Common Law Courts, and the Judge of the New Probate Court. What is styled by the Act “the Full Court,” will, in effect, consist of the Lord Chancellor, Lord Campbell, and the Judge Ordinary (Sir C. Cresswell). The “Full Court” will decide petitions for divorce—that is, dissolution of marriage, subject to the review of the House of Lords, and suits of nullity, subject to no review. It will also determine all applications for new trials, bills of exception, special verdicts, and special cases, subject to no appeal. The “Full Court” will further receive and determine all appeals from the Judge Ordinary, and their decision on such appeals will be final. The Judge Ordinary’s chief business, either alone or with one of the other judges, will arise from petitions for judicial separation, which will give the wife an independent status, and in general secure for her the custody of the children—advantages unknown in the ecclesiastical courts. Every decision of the Judge Ordinary is subject to the review of the “Full Court.” One of the most important provisions of the new law, is the protection afforded to the property and “earnings” of deserted married women. It is declared by sect. 21 of the statute (20 and 21 Vict., c. 85)—

“A wife deserted by her husband may, at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country, to justices in petty sessions, or in either case to the court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him, and such magistrate or justice, or court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property, acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him; and such earnings and property shall belong to the wife as if she were a *feme sole*; provided always that every such order, if made by a police magistrate or justice in petty sessions, shall, within ten days after the making thereof, be entered with the Registrar of the County Court within whose jurisdiction the wife is resident: and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the court or to the magistrate or justice by whom such order was made, for the discharge: provided also, that if the husband shall seize or continue to hold any property of the wife after such notice of any such order, he shall be liable at the suit of the wife (which she is hereby empowered to bring) to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid.” If the order be made, the wife is to be considered in the same position, as to property and to suing and being sued, as if she had obtained a decree for a judicial separation.

Appointments, etc.—The seat vacated by the removal of Mr Justice Cresswell, has been filled by the appointment of Mr Serjeant Byles, known to the legal world as the author of the excellent work on Bills, and to the general public, as a Protectionist pamphleteer. The preferment of so zealous a political opponent, is another evidence of the desire which the present Chancellor has always manifested, to be guided, in the exercise of his patronage, solely by professional merit, and altogether irrespective of party considerations. We quite concur in the remarks which this appointment has called forth:—"A firm adherence to the principle that professional fitness, and not political opinions, ought to form the guide in judicial appointments of all kinds, is especially valuable in the present day, when the legal patronage vested in the Chancellor is so enormously increased by the recent creation of subordinate judgeships. In a free country, few possessions are more valuable than the thorough independence of that profession which has been, and again may be, intrusted with the defence of endangered liberty against the encroachments of irritated power. Once proclaim and act upon the principle that judicial office, high or low, shall be the prize of political subserviency or parliamentary adhesion, and the independence of the bar is at an end. Instead of a body of free-spirited advocates, you have a crowd of expectant placemen."

The Irish law appointments, after a delay unprecedented in the records of place-filling, are finally settled. Mr Serjeant O'Brien is to be the successor of the late Judge Moore in the Queen's Bench, and Mr Henry George Hughes succeeds to the Solicitor-Generalship in the room of Mr Christian, the new judge in the Common Pleas.

The Queen has appointed Walter Harding, Esq., to be Chief Justice; Henry Connor, Esq., to be First Puisne Judge; and Henry Lushington Phillips, Esq., to be Second Puisne Judge, of the Supreme Court of the Colony of Natal.

The papers record the death of an eminent lawyer, who was long a distinguished ornament of the English Bench. The Right Hon. Sir Wm. Henry Maule died on Saturday morning, the 16th inst., in the 73d year of his age, at his residence, 22, Hyde Park Gardens, from the effects of bronchitis. The deceased was a Fellow of Trinity College, Cambridge: senior wrangler and first Smith's prizeman in 1810; led the Oxford circuit for many years; was M.P. for Carlow from 1837 to 1839; was appointed a Justice of the Court of Common Pleas, which position he resigned in 1856, and was succeeded by Mr Justice Willes. He never held the office of Attorney or Solicitor-General, but was a Q.C. when he was raised to the Bench. He was made a Privy Councillor in 1855. The deceased was a "Whig and something more," and was a staunch supporter of the Government during the short period he was in Parliament.

New Books.

Commentaries on the Law of Scotland. By GEORGE JOSEPH BELL.
The Sixth Edition. By PATRICK SHAW, Advocate. Edinburgh:
T. and T. Clark.

WRITING, as we do, for lawyers who are in the daily habit of finding authority for every point in the great work of Mr Bell, we are sure we do not exaggerate when we say, that the issue of a new edition is an event of the greatest possible importance. At three different epochs, Scotland has produced three great commentators on the law. In the seventeenth century, Lord Stair adapted the spirit of Roman Jurisprudence to the requirements of his time. A century later appeared Mr Erskine's immortal Institute, containing a most luminous exposition of feudal principles, and the law of real property, the branch which, from the then circumstances of the country, was of chief interest in his day. With the growth of commerce, and the rise of mercantile law to its present paramount importance, a department remained to be supplied; and to fill up this void was the appointed mission of Mr George Joseph Bell. In 1816 these Commentaries were first given to the world; and the fifth edition, so long ago as the year 1826, was the last which he lived to prepare. The great service which this work has rendered to the profession of the law, it is impossible to over-estimate. To the profoundest erudition, in the legal lore of ancient times, the author united a rare familiarity with the different systems of modern Europe. Being thus in a position to trace the principles of the Roman code, as they had been illustrated by modern jurists, and modified by the usages of modern states, he left behind him a work which, it is not too much to say, was one of the greatest contributions which the science of general mercantile jurisprudence ever received.

The legal relations which arise from mercantile transactions, complex in character as they are, and infinite in extent, are guided by principles peculiar to no one system of law. The rules by which they are regulated are derived from different sources, and have now been moulded by the jurists of different countries, into a flexible and universal code. The writings of Valin, Emerigon and Pothier, the dicta of the Parks, the Bayleys and the Tenterdens, are of almost equal authority with the decisions of our own judges. In point of fact, systematic mercantile jurisprudence, so far as Scotland is concerned, can scarcely be said to date much beyond the present century. The rule of stoppage in transition is, in this country, not older than the year 1790. The decisions of the House of Lords in cases on appeal, have done much to prevent our system becoming one of a narrow, technical, and provincial kind; and without infringing on its radical principles, have widened their application, so as to bring

our mercantile law into almost complete harmony with that of the sister kingdom. Principles are thus refined by the keenness of professional acumen, and the anxieties of individual interest. In directing the current of legal opinion, and moulding its results into a system, what England owes to Lord Mansfield, may be said to be due from Scotland to Professor Bell. He is, indeed, the author of our Mercantile Law; and this simply because he has placed its principles on so sure a basis; has used, in their statement, so clear and dignified a style, and has brought to their illustration authorities drawn from such a vast variety of sources. Thus, while his work, refulgent with such light, yields to none in its attractions for the comparative jurist, he has so fixed everything, by case and authority, that it surpasses all others, as a practical guide in the daily exigencies of professional life. To the Scotch lawyer, it is a complete library in itself. Doctrine is to be found bearing more or less on every point that can occur; and if corroboration is deemed necessary to an authority so great as the writer's unsupported dictum is now universally recognised to be, the copious citation of cases, at the bottom of every page, dispenses with any further search into the decisions of our courts. In short, to one familiar with these two volumes, the practice of the law in Scotland is deprived of many of its difficulties.

But so numerous and extensive have been the changes of recent years, that the older editions have latterly become exceedingly defective. During the quarter of a century which has fully elapsed since the last issue, the amendment of our mercantile code has, year after year, engaged, to a constantly increasing extent, the attention of the legislature. Our feudal forms have been greatly simplified. The law of real property has been further affected by the recent legislation regarding entails. The law of bankruptcy has been completely remodelled; and, after several independent measures, was only, the year before last, reduced to one uniform and consistent code. Succession, both in moveables and as regards services, has been the subject of several important statutes. The amendment of the law of diligence against person and property, has removed many obstacles to the enforcement of the rights of a creditor. By the repeal of the Navigation Laws, and the passing of the Merchant Shipping Act, we have received an entirely new code of maritime law. Our present Joint-Stock Companies Law, is the very recent fruit of the rapid development of commercial enterprise; and, finally, with respect to contracts, some most important changes were effected by the statute passed in 1856, for the assimilation of the mercantile laws of the United Kingdom. These are only a few of the changes which have been introduced by express statutory enactment. Further, the copious references to the decisions, which was so prominent a feature in the former editions, were falling rapidly into arrear; and to maintain the value of the work, it has, for some time, been found that a new issue was absolutely indispensable.

The preparation of this new edition was, with great propriety, intrusted to Mr Patrick Shaw,—a gentleman, whose name is already well known to the profession, in connection with the “Digest of Decisions,” and other works of great practical utility. The careful accuracy which these laborious compilations exhibit, and the habits of patient and untiring industry which their preparation has enabled him to form—fitted him in a peculiar manner for a task requiring so extensive a familiarity with the Reports, and so intimate an acquaintance with all the text writers of the day. The work has occupied his unceasing attention for the period of five years, during which, all the leisure which the office of Sheriff of Chancery does afford, was freely given to the task. We, therefore, expected that this edition would be worthy of the Editor’s reputation; and the cursory examination which we have been able to make, has satisfied us that we have no cause to be disappointed. The new cases referred to in illustration of the text, are numerous, apposite, and, so far as we have been able to see, are accurately cited. The bearing of recent legislation on different departments of the work, has been carefully noted, either by a simple reference to the Act, or by a brief statement of the provision requiring the reader’s attention. Had so extensive additions as these been made to the notes as they stood in the last edition, the work would have been enlarged to most unwieldy proportions. Mr Shaw has, however, avoided this evil, either by making an abridgement of the statement of those cases which are included in Mr Bell’s “Illustrations,” or by confining himself to a simple reference to the latter work—a plan which can lead to no possible inconvenience, as we believe it is now in the hands of almost every practitioner. The cases quoted are taken almost wholly from the Scotch reports,—to have accompanied these with references to the decisions of the English and American Courts, is a task which no one man could have accomplished. The Editor has, therefore, contented himself with referring to such standard English and American text-books, as the works of Mr Addison, Mr Smith, Professor Parsons, etc. Happily new editions of these Treatises have lately issued from the press, and, by their assistance, the reader will have no difficulty in discovering the current of the judicial opinion of England and America respecting any of the doctrines laid down.

But the most important feature of this new edition, is the complete change which has been made in the arrangement. In this particular, the work may be said to have been entirely recast. The point of view from which the author originally proposed to review the entire system of our jurisprudence, was the relation of debtor and creditor. In accordance with this plan, the older editions began with a general sketch of the law of debtor and creditor, a difficult and abstruse subject which, strictly speaking, a reader cannot profitably enter upon, without thoroughly understanding the nature, origin, and extinction of obligations. Then followed, in no very regular order—a Treatise on Real and Personal Estate—on Con-

tracts—a Digression, in the Fourth Book, touching Preferences among Creditors—an Interlude on the subject of Partnership in the Fifth—and a Conclusion, composed of such strong materials as are to be found in Ranking—Mercantile Sequestration—Cessio—Caption—and Trust-Deeds for Creditors. This exceedingly inartificial mode of arranging his subject, was, doubtless, in a great measure due to the fact, that the undertaking was so vast in its range, that detached sections could only be overtaken at intervals; and they appear to have been thrown together very much as they were finished. In the present edition, however, the work has been most effectually cured of all defects on this score. Following very much the plan of the “Code de Commerce,” the subjects are now discussed in their natural order—and the different passages scattered throughout the work, bearing on one subject, have been gathered together under the proper heads respectively pertaining to each. We begin with the Constitution of Rights—The First Book embraces Mercantile and Maritime Contracts. We are next made acquainted with the different species of property, from which our debts may be paid, or the mode in which they may be secured—the Second Book is devoted to the consideration of the law as to Moveable Rights; and the Third, to Heritable Rights. The Fourth Book, which now concludes the volume, is entirely taken up with the Constitution and Effect of Bankruptcy—a department in which Mr Shaw has been obliged to make considerable interpolations in the text. This important part of his labours has been performed with sound judgment; and, in correcting the Author as to the modern practice, or supplying his imperfections, his additions are so made as to interfere little with the rest of the text. The superiority of the new over the old arrangement, is too apparent to require remark. This part of the work must have entailed great labour on the Editor, as several consecutive sentences have been taken from as many different pages. Thus, at page 12, we have a paragraph composed of passages taken from pp. 137, 140, 297, and 298 of vol. i. of the fifth edition.

For some time prior to his death, we are told in the Preface, that the Author was engaged in preparing a new edition. He had, it seems, expunged and re-written a considerable portion of the last edition. Of course, the present editor has availed himself of these MSS.; and to make this edition more complete, he has, in some instances, introduced chapters entirely new, from the Author's other writings.

Such are the general features of this new edition of this standard authority on the law of Scotland. The short time it has been in our hands, has not enabled us to make that minute examination which is due to a new issue of a work of its magnitude and importance; but, so far as our examination has proceeded, we feel assured that we are justified in saying, that the profession are under great obligations to Mr Shaw for the mode in which the laborious duty of

editor has been discharged; and that with his emendations, additions, and improvements, it is more than ever worthy of professional acceptance and reliance.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

ALERTON AND CO. v. ABERCROMBY AND CO.—Jan. 8.

Transaction—Sale—Stoppage in Transitu—Expenses—Bankrupt.

On 1st February 1854, Dickson and Company secured tonnage in the "Caledonia" for Melbourne. On 7th February they purchased goods on credit from Abercromby and Company for the Australian market. On 23d February, Abercromby and Company, by order, sent the goods on board the "Caledonia," and the mate gave the usual shipping receipt that the goods were shipped to the order and the risk of Dickson and Company. On 25th February Dickson and Company having got that receipt from Abercromby and Company, delivered it to the master of the "Caledonia," who gave them bills of lading in exchange in their name, as shippers of the goods. On 27th February, they indorsed the bills to Morton and Company. On 2d March, they held a meeting of their creditors, and on 6th March, were sequestered. Of same date, Abercromby and Company not having been paid by Dickson and Company, applied to the Sheriff as against them for re-delivery of the goods, and for interdict against the goods being carried away; and on 17th, under a supplementary petition, as against Morton and Company, they obtained interim interdict against them and all concerned, with an order to land and restore the goods. On 28th March Morton and Company, on consignment, obtained an order for re-shipment of the goods. After proof, and somewhat intricate procedure in the Sheriff Court, the case was advocated; and the question now was, Had Abercromby and Company right to re-delivery of the goods sold by them to Dickson and Company. They rested their claim on the ground, (1) That they had made timeous application for the stoppage of the goods *in transitu*; and (2), That the purchase was fraudulent, in respect at the date thereof Dickson and Company were meditating bankruptcy, and knew they could never pay the price. *Held*, (1) That the first plea was bad. Abercromby and Company were the sellers, not the shippers, of the goods; and the goods were not *in transitu* between the sellers and the buyers. If *in transitu* at all, it was between the buyers and their agents at Melbourne; (2), On a review of the proof, that Dickson and Company had commenced trading without capital, and had conducted a hazardous trade and enormous speculations on credit, being at all times in danger of bankruptcy, if disappointed of their foreign remittances. But that beyond the fraud involved in their general system of trading, they had not been guilty of fraudulent misrepresentations or false pretences at the time of the purchase. Therefore re-delivery refused on both grounds. *Held* also, that it was unnecessary to deal with the position of Morton and Company as indorsees of the bills of lading; but, if necessary, that they would have been entitled to the full benefit of their position as onerous indorsees. Further, the shipping agents and owners of the "Caledonia," having taken an active part in the whole litigation—*Held*, that they were entitled to their expenses up to the period of consignment. They had an interest to appear in the process; but, after consignment, their interest was effectually protected, and they should then have withdrawn from the contest.

NATIONAL EXCHANGE COMPANY v. DRERW AND DICK.—Jan. 12.

Process—Diligence.

Action for payment of money advanced to the defenders towards the purchase of shares of the pursuer's stock. *Defence*—Fraud, concealment, and misrepresentation as to the state of the Company's affairs. Issues were adjusted for trial. The defenders obtained a diligence for the recovery of documents, and thereafter moved for an order on the pursuers to produce certain balance-sheets of the Company referred to in certain minutes of the directors, and which they maintained, had been proved to be in existence, though not recovered under the diligence. The pursuers, by minute stated, that they had been unable to discover the existence of any such documents, other than those which had been recovered under the diligence; and if any such existed, now or formerly, they were ignorant of the fact. *Pleaded* for the defender, this answer is evasive. The pursuers are bound to state judicially whether the documents called for ever or never existed; and whether they ever or never were in their possession, or that the documents, already produced, are those called for; or, if not, then to explain where they are. *Replied*—The defenders having failed to recover the documents under their diligence, the pursuers' answer, that they are ignorant of their existence, was conclusive. *Held*—That if the minutes had proved that the documents called for had been produced at a meeting at which the directors were present, that would have sufficiently proved that the documents had once been in their possession, so as to entitle the defenders now to call on them to produce the documents, or account for them; but as there was no such evidence that the documents ever were in their possession, *Motion* refused.

CALEDONIAN AND DUMBARTON RAILWAY COMPANY v. LOCKHART.—Jan. 13.

Process—Expenses.

The auditor's report in this case was given in on 13th January 1857. The pursuers and defenders both lodged objections. Those for the defenders were disposed on 17th November 1857, certain objections being then allowed. Those for the pursuers were now all disallowed. The defenders had been successful in the litigation, and now moved for interest on their expenses—which consisted largely of outlay—since the date of the auditor's report. They had only objected to the auditor's report defensively, and were quite willing at first to take payment as taxed by the auditor.—(*Barclay v. Barclay*, 5th March 1850.) *Motion refused*. Interest was only given in very exceptional cases. No reason had been stated for giving interest prior to 17th November, when the defender's own objections were disposed of, and too short a time had since elapsed to warrant such a claim on the ground of unreasonable delay.

GUILD v. EWING AND Co.—Jan. 15.

Process—Relevancy—Investigation before Judgment.

On 26th August 1853, Ferguson, a commission agent in Glasgow, deserted his house and business, and was not heard of till 26th September, when his dead body was found in the river Clyde. His estates were sequestrated on 7th October; on the day on which he disappeared, he handed over to the defenders L.914, 2s. 6d. in cash. His trustee brought a reduction of that transaction, as constituting an illegal preference under the Act 1696, and a fraudulent preference at common law, on the ground, that Ferguson dealt with the defenders under a special "bargain and agreement," whereby the goods purchased by him, in the course of any month, "became due and payable not sooner" than the last "cash day" of the following month, i.e., the last Tuesday or Friday, whichever came last, and that Ferguson was then entitled to discount of 5 per cent.; but that, on the occasion in question, Ferguson, without any special bargain or allowance of additional discount, voluntarily stepped out of the ordinary course of dealing, and, four days before any debt was due or payable by him, paid this money, being, at the same time aware that his affairs were irre-

trievably insolvent, and that he was on the eve of bankruptcy. *Defence*—(1.) The thing complained of, is *payment* of money by a debtor to his creditor, which is not *satisfaction*, in the meaning of the Act 1696; therefore the action, in so far as laid on the statute, is irrelevant. (2.) It is also irrelevant at common law, in as much as fraud on the part of the creditor, is not alleged. The Lord Ordinary sustained these pleas. The First Division recalled his interlocutor *in hoc statu*, and ordered issues to be lodged. The pursuer proposed to take issues under the statute, and at common law; but the defenders contended that they were entitled, as matter of right, to a judgment from the Court, expressly sustaining or repelling their pleas on the relevancy, before going into any inquiry as to the actual facts of the case. *Held*—That the time and mode of disposing of such pleas was a matter for the discretion of the judge; and that, if the defenders' contention were sustained, a defender desiring to baffle his creditor by delay, might accomplish his object with certainty, and at a very moderate cost, by merely adding to his other pleas, a plea on relevancy, and insisting on a judgment upon it, *in limine*, which judgment, if against him, might be reclaimed against to the Inner House, and perhaps appealed; and that, while in all cases, it was desirable to adjudicate on ascertained facts, this was eminently a case in which investigation ought to precede judgment.

DENHOLM v. HIS CREDITORS.—*Jan. 16.*

Bankrupt—Cessio.

Application, by an insolvent flesher, for cessio. The bankrupt's loss was stated to have arisen partly from selling at an under value, for three years, in order to compete with a rival establishment, partly from the malpractices of dishonest servants, and partly from income-tax payments on profits. His application was unopposed; but the Court were not satisfied with this explanation, and refused the application.

Pet. LEARMONTH.—*Jan. 21.*

Bankruptcy—Discharge.

A clergyman, whose estates had been sequestrated, applied for discharge. His debts, as stated by his trustee, amounted to L.1500. There was a preferable debt of L.139, 13s. 7d., being arrears of contributions to the Ministers' Widows' Fund. His household furniture and crop of the glebe realized L.100. His stipend, increased by an allowance from the Exchequer, amounted to L.150. But of this sum the petitioner stated that he had to pay Presbytery and Synod expenses, L.15; premium of life assurance, L.14; Ministers' Widows' Fund, L.7, 17s. 6d.; income-tax, etc., L.12, 5s. 2d. Man and horse for glebe and parish duty, L.50. He valued the glebe at L.28. The manse produced him no revenue. The trustee valued the glebe at L.40, and the manse at L.75. The creditors were willing to allow the petitioner one guinea and a half per week, with the manse and garden, and a small field of glebe valued at L.5. The petitioner refused this, and offered to pay L.50, for five years, out of his whole income. The creditors refused this offer, and the trustee therefore opposed this application. *Held* that the petitioner had not made out a case for discharge. It was desirable that a minister should have a sufficient income, but still more so that he should pay his debts.

SECOND DIVISION.

THE MARQUIS OF HUNTLY v. DYCE NICOL.—*Jan. 8.*

Property—Entail—Right of Shooting—Res Judicata.

In a summons of declarator, molestation, and damages, at the instance of the Marquis of Huntly against Mr Dyce Nicol of Ballogie, there was *inter alia* a conclusion for declarator, that the pursuer had the sole right of hunting and fowling within the forest of Birse.—The defenders pleaded *res judicata* in respect of judgments pronounced by the Court, and affirmed by the House of

Lords in 1809 and 1812, in actions between Innes, then of Ballogie, and the late Lord Aboyne, the predecessors respectively of the parties in this cause; in which actions, under a conclusion to the effect that the pursuer Lord Aboyne, had the sole right of hunting and fowling within the Forest of Birse, "subject to a personal privilege in favour of Mr Innes, as proprietor of Ballogie, of shooting wild fowl in the forest of Birse; the question of the defender's right to shoot within the forest had been fairly raised and litigated,—the Court having, by that decision, found that Innes, as proprietor foresaid, had a *privilegium aucupandi*, or right of fowling therein, by virtue of his titles and of usage. The pursuer answered, that the previous decision of 1812 proceeded upon an admission by Lord Aboyne in his summons of declarator, which he was neither bound nor entitled to make, that the question of the defender's rights was therefore never raised at all, that the admission was made by his predecessor under erroneous advice as to the defender's rights, and that, at all events, the admission having been made by a proprietor under an entail, it could not affect the rights of a subsequent heir. The Court, adhering to the judgment of Lord Handyside (Ordinary), sustained the plea of the defender.

ROBERTSON v. ROBERTSON.—Jan. 9.

Proof—Writ—Presumption—Loan.

The pursuer raised this action for the sum of L.100, alleged to have been lent by her to her niece the defender, and libelling on an unstamped holograph acknowledgment, granted by the defender, in these terms,—“31st October 1848, —I hereby acknowledge the receipt of one hundred pounds from Miss Jane Robertson, and agree to pay interest on the same, if demanded.” (Signed) “Christina Robertson.” The defender alleged that the money had been paid to her as a donation on behalf of her sister Jane, the pursuer's namesake, to whom the pursuer then stated she intended to bequeath that sum, but gave it to her in 1848, as she was then about to be married, and to proceed to China with her intended husband; and that the acknowledgment was afterwards granted by the defender at the pursuer's request, the defender's understanding being, that the interest was only to be paid in the event of the defender being able to pay it, and the pursuer falling into such circumstances as to require it. Lord Benholme (Ordinary) allowed the defender a proof of her averments, and conjunct probation to the pursuer. Observed in his Note,—the presumption that loan, and not donation, was intended, might be redargued by contrary proof: that this was not a violation of the rule that written documents cannot be cut down by parole proof, for when a writing was in itself doubtful, parole proof of facts and circumstances might well be advanced to explain it. The Court altered this judgment, and found that the defender was only entitled to a proof by the oath of the pursuer.

Authorities.—Ersk. Inst., L. iv., T. 2, sect. 36; Ogilvy v. Abercrombie, 1703, M. p. 11510; Donaldson v. Walker, June 11, 1711, M. p. 11511; Ross v. Fiddler, Nov. 24, 1809, Fac. Col.; Watt v. Macfarlane, Feb. 15, 1828, Fac. Col.; Allan v. Murray, June 13, 1837, xv. S. and D., p. 1130; Ross v. Matheson, June 25, 1847, ix. D. p. 1366; Martin v. Crawford, June 4, 1850, xii. D. p. 960.

GAIRDNER v. MILNE AND CO.—Jan. 15.

Principal and Agent—Lien—Retention.

Milne and Co. were in use to purchase grain in England on behalf of Currie and Co., merchants in Glasgow. The course of dealing was, that Milne and Co. paid for the purchases which were made in their own name, and took Currie and Co.'s bill for the amount, including charges and commission. Currie and Co. became bankrupt, when Milne and Co. held their bills to the amount of L.14,000. Shortly before the date of the bankruptcy, Milne and Co. had purchased a cargo of wheat for L.1345; for this sum Currie and Co. granted bills; the wheat was shipped for Glasgow, and the bills of lading endorsed to Currie and Co. Milne and Co. insured the wheat in their own name for L.1400. The ship was lost, and Milne and Co. having procured the policy of insurance

from the brokers, recovered the sum insured from the underwriters. Gairdner, the trustee in Currie and Co.'s sequestration, raised this action for the sum recovered under the policy. It was pleaded, in support of it, that the defenders were not acting in a factorial capacity, and had therefore no right of lien; that they had waived such right, if they ever had it, by taking Currie and Co.'s bill for the price of the wheat; that the bill of lading having been endorsed to the bankrupts, the beneficial and insurable interest in the wheat was in them, and the broker held the policy for their behoof. The Court held that the defenders had the right of lien they claimed over the contents of the policy for the general balance due them by the bankrupts. The Lord Justice-Clerk dissented; he remarked, that factors had a right of retention for any balance due them, over whatever goods came into their possession in their factorial character; but that the facts of this case were quite different from those to which that doctrine applied:—much confusion had arisen from following the mistaken view of Professor Bell, who had confounded the right of retention with the right of lien, and treated the law of Scotland, as to lien, as similar to that of England.

Purmer's authorities.—Bell's Pr., sect. 1418, ii. Bell's Com. pp. 96, 114; Smith's Mercantile Law (5th edition, Dowdswell's), p. 541; Cowell v. Simpson, xvi. Vesey, p. 278; Horncastle v. Farren, iii. Barn. and Ald. p. 407; Howieson (1836), ii. Bingham's New Cases, p. 755; Duncan v. Johnstone, May 16, 1827, Fac. Col.

Defenders' authorities.—Stair, Inst., L. 1, T. 18, sect. 8; Bank of England v. Bank of Scotland, etc., Mar. 1, 1781, M. p. 14121; Douglas, Heron and Co. v. Brown, July 24, 1785, M. p. 7070; Cult's Creditors, Aug. 2, 1781, M. p. 3137; Niven v. Allan, June 27, 1821, Fac. Col.; Skinner v. Paterson, May 21, 1823, Fac. Col.; Stephenson v. Black, I. Maule and Selby, p. 534.

MACDOUGAL v. WILSONS.—Jan. 15.

Legition—Title to sue.

In an action by a husband against the executors of his wife's father, concluding that the defenders should be decerned to pay to him a legacy left to his wife by her father, that the defenders should count and reckon with him for his wife's legition, and pay him the same, or if he could not claim both the legacy and legition, that he was entitled to make an election. The defenders pleaded, that the action, so far as concluding for legition, ought to be dismissed, in respect the pursuer's wife was no party thereto, and that it had been raised without her sanction or authority. The Court, adhering to the judgment of Lord Benholme (Ordinary), *diss.* Lord Murray, repelled the defender's plea; observed by Lord Cowan, that in such a case, if there was any ground for thinking that diversity of interests between a husband and wife existed, the proper course might be to order intimation to the wife; and, perhaps, in such a case, the right of election between legition and a legacy, as to which the *jus mariti* was excluded, might be held to belong to the wife.

Authorities.—Stair's Inst. L. i. iv. 9; Ersk. Inst. L. i. T. 6, sect. 30. Bell's Pr., sect. 1561; i. Fraser's pers. and dom. rels. p. 278; Shand's Practice, p. 149; A. B., Nov. 29 1733; ii. Elchies, p. 190; Aitken's v. Orr, Feb. 11, 1802; M. p. 16140; Ferguson v. Cowan, June 3 1819, Hume p. 222. Fraser v. Brown, Hume, p. 210; Wilson v. Tait, June 4, 1831; ix. S. and D. p. 608; Stevenson v. Hamilton, Dec. 7 1838, 1 D. p. 181; Duchess of Buckingham v. Winterbottom, June 13 1851; xiii. D. pp. 1129, 1347; M'Murray v. Govan, July 17 1852; xiv. D. p. 1048.

DE BERNARDY v. DENNISTOUN.—Jan. 19.

Summons—Revelancy.

The pursuer wrote to the defender, stating that he was aware of a debt due to the defender's relative Thomson, and offering to recover it for a commission of fifty per cent. The defender agreed to the terms proposed. In the course of the subsequent correspondence, it appeared that an authority from Thomson

to uplift the fund was necessary, which the defender did not supply; he stated that it could not be procured, as Thomson was a lunatic. The pursuer raised this action, concluding that the defender should be decerned to make payment to him of the sum of L.45, as the amount of commission payable by the agreement with the defender, or as payment for the trouble and outlay made, and information given. The Court, adhering to the judgment of Lord Handyside (Ordinary), *diss.* Lord Cowan, *held* that there were no averments to support the alternative conclusion of the summons, and assoilzied the defender. The Lord Justice-Clerk observed, the first conclusion was correctly in the summons, as the necessary authority might have been furnished in the course of the action: but instead of such an alternative conclusion as "that the defenders, in respect of their failure to implement their agreement, should be decerned to pay the amount incurred for trouble and outlay," there was a conclusion on which the court could not go into an investigation as to the *quantum meruit*;—the sum charged for commission, and no other, being concluded for as payment for trouble and outlay.

NORTON AND OTHERS v. BRAIDWOOD AND OTHERS.—Jan. 21.

Superior and Vassal—Non-Entry.

It was agreed between the superior and the trustees of a vassal that they should take an entry in the name of one of themselves, and pay a sum agreed on as composition. A charter was drafted in terms of the agreement, and revised on behalf of the vassal. After some further correspondence, and the lapse of some years, the trustee, in whose name the entry was to be taken, wished the entry to be given to his son, who had been assumed as a trustee. An action of declarator of non-entry was raised. The defenders stated their willingness to enter and pay the legal composition. Lord Handyside (Ordinary), found the defenders bound to take the charter, the terms of the draft which had been agreed on and extended. The defenders reclaimed; they pleaded, that the pursuer had two courses—either to raise an action for implement of the agreement, or an action of declarator of non-entry,—having chosen the latter, he was not entitled to found on the agreement to take a charter in any particular terms. The Court adhered.

O'NEILL AND HIS CURATOR v. WILSON.—Jan. 21.

Liability of a Coalmaster for injury in a coal-pit.

O'Neill, a boy of sixteen, was employed by the defender in a coal-pit. His duties were to attend to the machinery used for lowering coals by a "blind shaft," or shaft between the workings in one seam and another. The shaft was 118 feet deep. The workmen in the upper seam, when their day's work was concluded, were lowered in the cage, and proceeded along the workings in the inferior seam to the pit bottom; and O'Neill, after lowering the men, came down the shaft by a ladder. The ladder was without landing places between the top and bottom, and was fixed along the side of the shaft by two needles, or cross pieces of timber. After being employed in the pit for eighteen months, O'Neill, in coming down the ladder, missed his footing, and falling upon a wheel at the bottom of the shaft, both his legs were broken. In an action of damages against the coalmaster, it was proved that such ladders were common in pits; that the pursuer had been accustomed to descend the ladder too fast, and had been reproved for doing so; that on the occasion on which he fell, he was descending too fast, and that he had a flask in one hand. The Court, adhering to the judgment of the Lord Ordinary, found that he was not entitled to damages. The Lord Justice-Clerk observed, that the accident was clearly caused by the recklessness and carelessness of the pursuer himself. In deciding the case, he threw out of view that the injuries were more severe because O'Neill had fallen upon the wheel at the bottom of the shaft. If the fall was owing to a defect in the ladder, the defender was liable for whatever injuries were received; but the fall being the result of the pursuer's want of caution, that he fell on a piece of machinery, and was thereby more severely injured, did not make the defender liable.

English Cases.

JOINT-STOCK Co.—Amalgamation.—Plaintiff effected an insurance with an Insurance Company, whose policies, *inter alia*, provided “that the capital stock and other the securities, funds and property of the said company, remaining at the time of any claim or demand made, unapplied, and undisposed of, and inapplicable to prior claims and demands in pursuance of the provisions of the said deed of settlement, shall alone be liable to answer and make good all claims and demands upon the said Company, or otherwise under or by virtue of this policy; that no director, etc., shall be in anywise individually or personally liable.” The deed of settlement contained no provisions for an amalgamation, but certain provisions with regard to the dissolution of the Company. The Company amalgamated, and plaintiff contended that, by the transfer, the Company disposed of all their property contrary to the agreement in the policy. These circumstances were held to disclose no cause of action; they only disclosed what might hereafter by possibility become an injury. In the first place, there was no implied covenant by the Company to carry on the business. Williams, J.—“Even if the deed of settlement were out of the question, it is difficult to see that there is anything beyond a contract that the plaintiff shall be paid, or his executors shall be paid, the amount of the policy when it falls due, and that he shall have a share of the profits, if any are made. It is difficult, if not impossible, leaving the deed of settlement out of the question, to imply, from the circumstances of his right to a share of the profits, a contract on the part of the Company that they will, for his benefit, and to give him a better chance of having profits, continue the business, supposing the circumstances shall arise. Then the next question is, supposing there is no implied covenant or contract, can the declaration be supported in the aspect to which it is more prominently framed? I mean the view, that the conduct of the defendants amounts to a voluntary disabling, on their part, of themselves from performing their contract. There is no doubt, if any person who enters into a contract to do a thing at a future period takes some step voluntarily which makes it impossible that, when the proper time arrives for performing the contract, he can perform it, the party prejudiced by it is not bound to wait till the time arrives, but he may at once bring his action for a breach of the contract if there is sufficient evidence to show that it cannot be fulfilled. The question is, did the circumstances in this case support that view of the case? It seems quite clear that they do not. There is nothing to show that the defendants have disabled themselves from performing the contract, and, therefore, the plaintiff has no case at all. This is not like the case that was in the contemplation of the person who drew this declaration, that being a case where a woman undertakes that she will do a certain act which she cannot do unless she is a single woman; she marries, and so makes it utterly impossible that she ever can perform the contract. In that case, of course, an action may be maintained, but there is nothing of that sort here. Therefore, I think this rule must be made absolute.”—(*King v. The Accumulative, etc., Insurance Co.*, C. B., 30 L. T. Rep. 119.)

NEGLIGENCE.—Railway Station.—Plaintiff arrived at New Cross station to go by a train at 11:45 P.M. He inquired the way to the urinary of a stranger on the platform, who pointed to a place where there were two doors; over one were the words, “For gentlemen;” over the other, “Lamp-room.” Over the former there was a light; over the latter, none. Plaintiff, an illiterate man, passed through the door leading to the lamp-room—fell down a flight of steps, and hurt his head. The Railway Company were found to be not liable. Williams, J.—“If it had been shown that the steps were dangerous, the case might have been different. Willes, J.—To make out a case of negligence, some fact

must be proved more consistent with the defendants having through negligence caused the injury, than the opposite theory. There was nothing to show that the steps were more than ordinarily dangerous, nothing to show that they were out of the ordinary course. It is impossible for a man to dispose his property in such a way but that a man may by accident or negligence injure himself. There is no evidence that an accident might not have been avoided by a man of ordinary prudence and care.—(*Tooney v. the London, Brighton, and South Coast Railway Co.*, 30 L. T. Rep. 135.)

PATENT.—*Novelty.*—Under some circumstances, there may be a patent for the application of an old process to a new process, but then there must be some invention in the mode in which it is applied. A patent was taken out in 1853 for improvements in finishing cotton and linen yarns. In 1856 the same parties took out another patent for improvements in finishing yarns of wool and hair. The patent of 1856 was held by the Q. B. to be bad, the mode of proceeding being entirely the same, and the effect the same, and the only difference being the materials to which they were applied.—(*Brock v. Aston*, 30 Q. B. 131.)

SOLICITOR.—*Lien for Costs—Set off.*—A cheque was deposited in the hands of a solicitor by B, along with a memorandum stating that it was to be applied in liquidation of the sum to be recovered by A, the solicitor's client, in an action against B. The amount due was settled by arbitration; and A having subsequently become bankrupt, B was found in bankruptcy entitled to prove a cross-claim, under a bill which before he had been unable to plead in defence, on the ground that the bill was not due. On application being made by B for the recovery of the cheque, it was contended that the solicitor was a mere trustee or stakeholder; but V. C. Wood held the solicitor entitled to his lien over it for the amount of his costs. The moment the debt was liquidated, the agreement authorised the appropriation of the money to the payment of the debt. That was admitted; but it was said that before that moment arrived the bankruptcy had intervened, and the order in bankruptcy had been made, appropriating that debt towards the satisfaction of a cross-debt. The V. C., however, considered that the right, when it arose, related back to the date of the memorandum. The money had been placed *in medio*, and the moment the debt was ascertained, it could be appropriated according to the rights under the agreement.—(*Hanson v. Reece*, 30 L. T. Rep. 130.)

INSURANCE.—*Misrepresentation.*—The assured, in his proposal for a life-policy, said, "he was not aware of any circumstances, or that he had any disorder, tending to shorten his life, or to make an assurance on his life more than usually hazardous." In an action by his representatives for the amount of the policy, question, whether it was enough for the insurance office to show that two illnesses in 1853 and 1854 (the insurance being effected in 1855) did in fact tend to shorten life. The learned judge ruled, and directed the jury, that if the assured honestly believed at the time he made the declaration that the bilious attacks had no effect upon his health, and did not tend to shorten his life, or to render an assurance upon his life more than usually hazardous, the fact, that he was aware that he had had those attacks, even though (without his knowledge) they had such a tendency, would not defeat the policy. The jury found for the plaintiff for the amount of the policy. The C. B. held the ruling to be right. Wightman, J.—In the argument we were referred by the defendant's counsel to several authorities—amongst others, *Lindeman v. Desborough*, 8 B. and C. 586—as establishing the proposition which, as a general rule, is indisputable, that it is the duty of a party effecting an insurance on life or property to communicate to his underwriter all material facts within his knowledge touching the subject-matters of the insurance, and that it is a question for the jury whether any particular part was or was not material to be communicated. It is, however, equally clear that the underwriters may, in any particular case, limit their right in this respect to that of being informed of what is in the knowledge of the assured, not only as to its existence in point of fact, but also as to its materiality; and, in our opinion, that is the effect of the limited declaration required in the present case, as to disorder, or circumstances tending to

shorten life, or to render an insurance upon the life insured more than ordinarily hazardous. Therefore, upon the construction of that clause, which alone was relied upon at the trial, we are of opinion that the direction of the learned judge was right, and that the rule for a new trial ought to be discharged.—(*Jones v. Provincial Life Assurance Co.*, 30 L. T. Rep. 102.)

MERCHANT SHIPPING ACT.—Compulsory Pilotage.—The case of *Banks v. Stanton*, 30 L. T. Rep. 118, was a case stated by consent upon a conviction before justices. It decided simply that the old exemptions from the compulsory employment of pilots, contained in sect. 59 of the 6 Geo. IV., c. 125, are still kept alive by sect. 353 of the 17 and 18 Vict., c. 104 (Merchant Shipping Act), notwithstanding sects. 376 and 379 of the latter statute, and notwithstanding also the 6 Geo. IV., c. 125, is wholly repealed by the 17 and 18 Vict., c. 120.

INSURANCE.—Marine.—Master's Effects.—Goods insured were described in a policy as “master's effects,” and the memorandum as to average was “free from all average.” Some of the goods thus insured were totally lost by the perils insured against, but others were saved. At the trial before my Lord Chief Justice, it was contended, on the part of the plaintiff, that he was entitled to recover in respect of the goods which had been lost as for a total loss of the subject insured. And it was argued that the present case must be governed by the recent decision of *Ralli v. Janson*, 6 E. and B. 422. C. B. was of opinion that the case was distinguishable from *Ralli v. Janson*. In that case the Ex. Ch. thought that, as the insurance was on goods generally, and by the memorandum “seed” was warranted free from average, it was necessary, in the natural construction of the terms of the instrument, to apply the exception to all linseed on board collectively, whether shipped in bulk or in separate packages, and that the court could not apply the warranty to each bag in which the seed happened to be packed, as a distinct object. But no such difficulty occurred in the present case. The articles which constitute “the master's effects” have no natural or artificial connection with each other, but of necessity, must be essentially different in their nature and kind, in their value, in the use to be made of them, and the mode in which they would be disposed on board. The word “effects” was obviously employed to save the task of enumerating the nautical instruments, the chronometer, the clothes, books, furniture, etc., of which they happened to consist. And although it was stipulated by the warranty that these effects shall be free of all average—or, in other words, that the insurer shall not be liable for any amount of sea-damage to them, short of a total loss—the court thought, looking at the nature of the subject of insurance and the terms of this exemption, it was doing no violence to the language used to hold that he was not to be exempted from liability for a total loss of any of the articles of which the “effects” consist; that the contract otherwise construed would be quite at variance with the subject for which, as it is well known, the memorandum as to average was introduced into policies, viz., that, since it may be difficult to ascertain the true cause of the damage which goods of certain kinds, such as those usually specified in the memorandum, receive in the course of a voyage, whether it arose from the nature of the articles themselves, or from the perils insured against, the insurers thereby expressly provide that as to some kinds of goods they will not be answerable for any average or partial loss, and as to others, that they will not be liable for such loss not amounting to a certain per centage on the goods.—(*Duff v. Mackenzie*, 30 L. T. Rep. 103.)

NEGLIGENCE.—Local Board.—Contractor.—The Chelmsford Board of Health employed defendant to make an excavation, which, during the night, was left without a light, and plaintiff, in driving along in his gig, was upset and injured. *Answer*—Plaintiff was on the wrong side of the road. (2.) Defendant was protected by Health of Towns Act, sects. 138-9-40 and 169, and if any one was liable, the Board of Health should have been sued. Contractor held personally liable. Lord Campbell, C. J.—The plaintiff had a right to go on the side of the road on which he did go, when he had no reason to apprehend any obstruction. Although the rule of the road is very convenient and ought to be observed,

still, if a person has no reason to suppose that there is any obstruction, he may go on the right or on the left side, or in the middle of the road. It was for the jury to say whether the plaintiff did not contribute to the injury. The next question then is, against whom should the action be brought? The defendant was employed by the Board of Health to do a particular act, viz., to dig a hole for a well. The defendant might have done that with his own hands, but he employed two servants to do it. They dug the hole in the highway. What they did, he did; what they omitted to do, he omitted to do. They allowed the hole to remain during the night without a light to warn people of the danger. That was negligence in them, and it was also negligence in him; and unless some statute absolved him, he is liable for the consequences. It is said that the Health of Towns Act absolved him. It would be very strange indeed if there was such an enactment, viz., that persons guilty of negligence, whereby their fellow-subjects suffered grievous injury, shall be indemnified, and that others who are in no way culpable, and know nothing of the act, and on whom no obligation to guard against it rested, shall be liable, and shall be called upon to compensate the injured party. There is no such enactment in the Health of Towns Act, and no authority for any such position in the cases cited. The maxim, *respondet superior*, does not absolve the *inferior*, if by his negligence a loss has been sustained. Where there is no negligence in the party who acts in obedience to the instructions of the Board of Health, he is not liable; but if in doing the act he is guilty of negligence, whereby loss and damage are occasioned to another, he is personally liable.—(Arthy v. Coleman, Q. B., 30 L. T. Rep. 101.)

RAILWAY.—Preference Shares—Dividend—The Great Northern Railway Company, in order to validate the fictitious stock fraudulently issued by Redpath, amounting to L.243,943, obtained an Act of Parliament, requiring them to apply the net revenue applicable to dividend for the half-year ending 31st December 1856, in buying up and then cancelling stock to the above amount. The balance being insufficient to pay the half-year's dividend to the preference shareholders, they claimed the deficiency out of next half-year's profits. The directors and ordinary shareholders opposed the application, contending, that the preference or guarantee depended on the amount of profits being sufficient to satisfy the preference shareholders. The question therefore came to be whether, if the sum to be divided, at any period of distribution, is insufficient to pay in full the dividends due to the holders of preference shares, they are entitled on the next declaration of dividend to receive the arrears unpaid as well as the new dividend? The V.-C. Wood decided in the affirmative; and the Court of Appeal adhered, holding that the preference given by the statutes confers a right to receive dividends at the stipulated rates, attaching not only on the profits accrued when the dividend is declared, but, if they are insufficient, then on subsequent profits.—(Henry v. Great Northern Railway Company, 30 L. T. Rep. 141.)

SALE.—Rescission—Stoppage—Goods were sold to a person, who, on their arrival, found he was insolvent, and gave orders not to receive them. They were, however, landed and locked up in his warehouse, he intending, as he wrote to the sellers, that the goods should be warehoused in their names were he compelled to stop business. The sellers then demanded the goods, and the vendee, on consulting with his solicitor, was informed that he could not return them in prejudice of his other creditors, for whose benefit they were afterwards assigned to the trustee. The Court of Q. B. held (1) That there was no rescission because, until there had been a full and mutual consent to rescind the contract, each party had a right to draw back, and to refuse to consummate the agreement for rescinding the contract: (2) That the transit was at an end, because the goods had arrived at the place originally destined for them, viz., the premises of the vendee.—(Heinecke v. Earle, 30 L. T. Rep. 147.)

RESET.—Husband and Wife—A husband and wife were jointly indicted for receiving stolen goods; the jury found both guilty, and that the wife received the goods without the control, or knowledge of, and apart from, her husband,

"who afterwards adopted his wife's receipt." Conviction quashed as regards the husband.—(Reg. v. Dring and wife, C. C. R. 30, L. T. Rep. 158.)

LEASE.—Breach—Licence—Action of ejectment from premises, which 20 years before were converted into a public-house, in breach of the lease. "Pollock, C.B.—We are all of opinion that this rule should be discharged. I believe we all think that where a breach of covenant has continued for a long series of years, and rent has been received, as in the present case, for upwards of twenty years, that that fact may be put to the jury to say whether they are not of opinion that there was a licence by the lessor. It is a maxim of the law of England to give effect to everything established for a length of time, to presume a right and not a wrong; and our decision in the present case is nothing more than giving effect to a notorious acquiescence. No person can be allowed to take advantage of a breach of covenant after twenty years, and it is not necessary to send the case down again to be tried.—(Gilson v. Dory, 30 L. T. Rep. 156.)

THEFT.—Animus furandi—Parties in the employment of a glovemaker, paid by the number of gloves finished, broke open a store-room in the premises, took a quantity of finished gloves and laid them on the table, with intent fraudulently to obtain money for them, as having been finished by them. No larceny; the intention must be permanently to deprive the owner of the property.—(Reg. v. Poole and Yates, C. C. R. 30 L. T. Rep. 158.)

AGENT AND CLIENT.—Compromise of Action—Implied Authority of Agent—This question was again considered in *Swinfen v. Swinfen*, 30 L. T. Rep. 160. At the trial of the case (which regarded the validity of a will) a compromise was made by counsel on statements made by the attorney, that a compromise was very desirable, and in the presence of the attorney, but without any authority from the client, who afterwards repudiated the agreement. The M. R. held that it was not binding. He observed—"The principle upon which the doctrine of principal and agent rests is this, that an agent has full authority to do everything that is within the implied scope of his authority. An attorney is employed to conduct a suit for a client. Now, I apprehend, it will be perfectly clear that a compromise does not in terms come within the conduct of the suit; it is not within the management of the cause. Does the authority extend to selling the subject-matter of the suit? Suppose an attorney is employed to recover an estate, does the authority extend to selling that to a stranger? Yet in point of fact a compromise is nothing more than a sale from the plaintiff to the defendant, and upon certain terms. It is obvious that no one would suggest that it is within the scope of the authority of a stranger. Can it be said that it is within the scope of the authority of the attorney? It appears to me that upon ordinary principles it cannot be so treated. I should as little expect, that if I employed a person to take certain horses to a particular place, and to feed them and to break them in, there would be an implied authority to him to sell or to exchange them. A coachman drives my carriage, and I am liable for all the acts which he does whilst driving the carriage; but he has no authority to exchange the carriage. Unless there is some different rule applicable to attorneys, it appears to me impossible to say that an attorney has, without the authority of his client, an implied authority to dispose of the subject-matter of the suit, instead of conducting the cause which he is employed to do."

DAMAGES.—Measure of—B. covenanted with C. to keep certain premises in repair, but allowed them to become dilapidated. The cost of repair would be L.40. C. had covenanted with D., the ground landlord, duly to pay rent, which he had failed to pay, so that C.'s reversion may have been forfeited, and of no value. In an action by C. against B., it was held that the measure of damages was what it would cost to put the premises in repair, not what might be the value of C.'s reversionary interest in the premises.—(Davies v. Underwood, 30 L. T. Rep. 154.)

JOINT-STOCK COMPANY.—Register—Shareholder—A book purporting to be a register of shareholders, made up by the solicitor by order of the board after

the company was virtually defunct, was held to be a register of shareholders within the 16th section of the Joint-Stock Companies Act 1856, although there were mistakes and omissions of dates therein.—(Greenfield's case, 30 L. T. Rep. 172.) But a book purporting to be a "draft register" of shareholders in the form required by the Act, but made up by the secretary by order of the managing director, and neither signed or stamped with the seal of the company, was held not to be "a register of shareholders" within the meaning of the above section, so as to fix the persons named therein with liability as shareholders.—(Ogilvy's case, 30 L. T. Rep. 173.) Where a company had not provided any particular form for the acceptance of shares, the letter of application inclosing the banker's receipt for the deposit money, and expressing the applicant's willingness to take the shares and pay the deposit and calls, is a sufficient acceptance within Art. 1 of Table B. of the Act of 1856.—(Greenfield's case, 30 L. T. Rep. 172.)

FRAUD.—The prisoner was indicted for obtaining money by false pretences. It appeared that the prosecutor, in consequence of seeing an advertisement in the *Times* newspaper, had a negotiation with the prisoner respecting the formation of a partnership between them as country merchants, in the course of which the prisoner made many false statements respecting contracts which he had obtained, and the amount of business which he was doing. The prosecutor, upon the faith of these representations, entered into the partnership, and an agreement to that effect was signed by both. In pursuance of that agreement the prosecutor paid to the prisoner, as part of the capital of the firm, the sum of L.500. The prisoner was convicted, but upon a case reserved for the C. C. R., it was held that the conviction was wrong, upon the ground that this was not a parting with the money within the meaning of the statute, it forming a part of the capital in which both prosecutor and prisoner were jointly interested.—(Reg. v. Watson, 30 L. T. Rep. 171.)

SUCCESSION.—*Leg. per. sub. mat. of Scotland imperative in England.*—Petition for the payment of L.730, paid into court under the L. C. C. Act of the town of Newcastle. In 1817 the petitioner David Don, a domiciled Scotchman, commenced a cohabitation with Elizabeth Hogg, a Scotchwoman, which resulted in the birth of a son in 1818. They were married at Dunfermline the following year, whereby petitioner's son was legitimated. This son died intestate in 1856, leaving the petitioner his father and heir-at-law, according to the law of Scotland; and the question now related to his right to the price of certain lands belonging to his son, in the neighbourhood of Newcastle, and which had been purchased by the Corporation under their Improvement Act. 3 and 4 Wil. 4, c. 106, sec. 6, enacts, "That every lineal ancestor shall be capable of being heir to any of his issue; and in every case, where there shall be no issue, his nearest lineal ancestor shall be his heir in preference to," etc. V.-C. Kindersley held that the father was incapable of succeeding; the word "issue" meaning "issue capable of inheriting according to the law of England." "It does not follow," he said, "that because D. Don the younger, was the legitimate son of his father, D. Don the elder, that he would therefore be entitled, according to the general law of this country, to inherit real estate in England, of which D. Don the elder might have died seised. That question arose in the case of *Birt-whistle v. Vardill* (2 Cl. and F. 571). In that case, a person, being a domiciled Scotchman, had cohabited with a woman, and during that cohabitation had a child born in Scotland; and afterwards married the mother. The father died intestate, seised of real estate in England, and the question was, whether the child being legitimate in Scotland, and regarded as legitimate so far as respected his personal status in this country, was entitled to inherit the real estate of which his father had died seised? The case first came before the Court of Q. B., reported in 5 B. and C.; and there the four judges of the court (Lord Tenterden being at the head of the court) all expressing their individual opinions,—that admitting him to be legitimate, something more than mere legitimacy is required to entitle him to inherit; that there was, by the rule of law annexed to real estate in this country, that which precluded him from in-

heriting. That case came before the H. of L., and the H. of L. propounded certain questions to the judges, stating the facts of the case, and putting the question to them, whether the son was entitled to inherit under the circumstances stated? The judges came to an unanimous opinion, that he was not entitled to inherit. The V.-C. was therefore of opinion that the legislature in the Act in question must be held to have used the word, "issue," in the sense in which it was understood by the law at the time.—(Re Don's Estate, 30 L. T. Rep. 190.)

SALE.—*Supposed Agent*.—Defendant, Jones, had been in the habit of dealing with one Brocklehurst, whose foreman was plaintiff, Bolton. Jones, to whom money was due by Brocklehurst, sent an order for goods addressed to him at his shop. This order was executed by the plaintiff Bolton, who, the day before, had bought the business, and entered into possession without notice to the public. On receiving the invoice the defendant repudiated the sale as by the plaintiff; because, otherwise, he would lose the set-off. Plaintiff nonsuited.—Pollock, C. B., "It is not only a rule of law, but of common sense; if you make a contract with A., B. cannot substitute himself for A., and claim the benefit of that contract, to your disadvantage. The order in writing was addressed and sent to Brocklehurst; some one else sues for the money, and the defendant's only course is to say, 'We made no contract with you.'" Martin, B. "There can be no doubt whatever upon the point. This was not a case of principal and agent at all, but that of a successor in business supplying goods on an order directed to his predecessor, and without, by the person ordering them, any knowledge of such a change. I go further, and I think, if a person means to deal with A., B. can put no contract upon him at all."—(Bolton v. Jones, Ex. 30, L. T. Rep. 188 c.)

PATENT.—An application for a patent for a process for making metal tubes, was opposed by applicant's foreman, on the ground that the invention was his. The evidence did not show how much of the idea was due to the one and how much to the other. The L.-C. solved the difficulty, by making it a condition of the patent being sealed, that it should be held in trust by the applicant for himself and his foreman jointly.—(Re Russell's Patent, 30 L. T. Rep. 178.)

MARRIAGE CONTRACT.—*Rights of Creditors*.—A husband, previous to marriage, promised his wife and her father that he would settle all her property upon her for her separate use, alleging that the deed would be as binding if made after as before marriage. On this condition the father gave his consent. The deed was executed after the marriage. The L.-C. (affirming the decision of the M. R.) *held*, That the settlement was voluntary, and void as against creditors; the facts disclosing neither a case of fraud on the wife nor of part performance sufficient to set up the parol promise.—(Warden v. Jones, 30 L. T. Rep. 206.)

FRAUD BY MISREPRESENTATION.—B. assigned his property to C. for the benefit of creditors, who caused the book-debts to be sold by public auction, when D. became the purchaser of two lots, for which he gave his acceptances. A few days before the first acceptance was due, he informed C. that he should not pay it, alleging that a fraud had been committed upon him by the good debts having been represented to be of greater amount than they really were. C. brought an action on the acceptance, upon which D. applied to the Court of Chancery for an injunction to restrain the action. The M. R. granted the injunction, but the Court of Appeal reversed the decision, being of opinion, upon the facts, that no fraud had been committed. But if there had been a fraud, it would have been granted.—(Dempster v. Graham, 30 L. T. Rep. 193.)

BILL OF EXCHANGE.—To an action on a bill of exchange by the indorsee, defendant pleaded that the indorser was both drawee and acceptor. It was held that this was no answer to the action, as only payment at maturity will discharge either drawee or acceptor.—(Dowling v. Mangan, 30 L. T. Rep. 202.)

SHIPPING—BOTTOMRY.—A British ship owned at Nova Scotia, concluded at New York a voyage from Glasgow. Being in need of repair, her master, with consent of her part owner, gave a bottomry bond, payable at New York on her

return to a port of discharge in the U. S. or British North America. Afterwards, the voyage being done, the bondholder agreed with the same part owner to postpone payment of the bond till after the conclusion of a subsequent voyage and arrival at a port of discharge as before, the bond to remain a lien on the ship. That voyage was performed, and on her reaching Liverpool in England, she was arrested by warrant of the Court. The validity of the bond and agreement being contested by the mortgages of three-fourths and the owner of one-fourth of the ship, it was *held*, (1) That it is not competent for the master, with the consent of the owner, to grant a bottomry bond on a British ship lying in a British port for a new voyage, to be suable in the Court of Admiralty. (2) That a bond granted upon a British vessel in a foreign port for expenses of repair or outfit for a new voyage, with the consent of the owner is valid, at least against the owner, in a suit in this court. (3) That a bond may be given, though money has not actually been advanced, to a person who has pledged his own credit for the expenses incurred. (4) That no particular rate of interest is essential to a bottomry bond, though, when the ordinary or a low rate of interest is taken, it raises a suspicion that sea-risk was not intended, and sea risk is essential to the jurisdiction of the court. (5) That a bottomry bond is entitled to priority of payment over a mortgage during the voyage for which the bond was executed. (6) That such a bond, when due, should be enforced within reasonable time, and that a voluntary agreement on the part of the holder to postpone payment under it alters its character totally, and substitutes a contract over which the Admiralty Court has no jurisdiction. (7) That secret liens on ships are against the policy of the general maritime law, and that of England in particular.—(Re The Royal Arch., 30 L. T. Rep. 198.)

PRINCIPAL AND AGENT.—*Unauthorised Agent—Damages.*—Action was brought by John Collen against the personal representatives of Robert Wright. Robert Wright professed to act as the agent of a Mr Gardner, and as such agent professed to enter into an agreement with the plaintiff for a lease from Gardner to him of a farm. The plaintiff was not aware that Mr Wright had no authority from Gardner, and he went to considerable expense in preparing the farm for cultivation; and upon Mr Gardner denying that Wright had his authority, he still, relying upon Wright's assertion that he had, filed a bill in Chancery in order to procure specific performance of the agreement into which Wright had entered. The result of that was, that it was established that Wright had no authority. Wright never withdrew the assertion that he had authority from Gardner to let the farm, not even after the Chancery suit for specific performance had been commenced, and he had received notice that he would be responsible if the suit failed in consequence of want of authority. The Court of Q. B. found the plaintiff entitled to all the expenses to which he had been put in consequence of the misrepresentation, including the costs of the Chancery suits. The Court of Ex. C. (*diss.* Cockburn, C.) affirmed the principle where a person *bona fide* believing that he has authority, which in fact he has not, makes a contract as agent, the person with whom he so contracts is entitled to hold him personally liable upon an implied contract that he has the authority which he professes to have.—(Collen v. Wright, 30 L. T. Rep. 209.)

THE

JOURNAL OF JURISPRUDENCE.

UNIVERSITY REFORM AND THE FACULTY OF LAW.

On a former occasion, we expressed a warm and cordial, if not altogether indiscriminating sympathy, with the efforts of our Scottish University Reformers; more especially, in so far as they have for their object the improvement, or rather, we ought to say, the completion, of the Faculty of Law in our metropolitan University.

Two or three sentences will suffice to remind those of our readers who perused our former article, and to explain to those who did not, the urgent necessity of this measure; and will secure, we believe, amongst professional men, for what is strictly a professional object, an unanimity of opinion for which those who canvass the respective merits of Fellowships, Tutorships, Professorships, and entrance and exit Examinations in the Faculty of Arts, will long look in vain.

Everybody knows that the first great division of the science of jurisprudence, according to the Romans, was into public law and private law. *Hujus studii duæ sunt positiones, jus publicum et privatum.* This division, springing, as it does, not from arbitrary and artificial arrangement, but from the nature of the objects with which the science is conversant, has been adopted wherever jurisprudence has been cultivated as a science, and has been unconsciously acted upon, not less unanimously, wherever it has been practised as an art. Greater prominence has been given to the one branch or to the other, according to the peculiar genius and circumstances of each particular people; and, accordingly, whilst to private law the Romans have been what the Hebrews were to the religion, and the Greeks to the philosophy and art, of the modern world, they did little for public law scientifically, except marking its position in the science.

Nor has there been any substantial difference as to the scope of the two great cognate branches which thus spring from the common stock of universal justice. *Publicum jus est quod ad statum rei Romanæ spectat, privatum quod ad singulorum utilitatem pertinet.* The first determines the mutual relations which subsist between the

citizen and the society in which he lives, to the constitution of which he contributes, and but for which he would be no citizen at all, but a mere isolated human unit, or, at most, the member of a family over whose wildest misrule no other individual or family would be entitled to exercise the slightest control. The second,—assuming the relations of each to all, and of all to each as determined,—has for its object to fix the relations of each to each. The active and sovereign attributes of the free citizen as a law-giver, and his passive and subject position as a law-obeyer, must obviously be provided for, before, in dealing with the relations of citizen to citizen, the transition can be made from moral duties to legal obligations. The reciprocal duties of parents and children, of husbands and wives, of tutors and pupils, of debtors and creditors, would exist though no State existed, but they would exist without the guarantee for their fulfilment which is afforded by the compulsitor of law. However we may distinguish them in theory, in practice it is the inalienable function of the community as a whole, to draw the line between ethics and law. Whatever may be our verdict, then, as to the relative dignity or importance of these two great departments of the science which we profess, we have already said enough to show, that whilst the adequate study of either involves the study of both, the precedence in scientific arrangement, by what we may call a logical necessity, belongs to public law.

So much for public law in the sense in which, but for it, there could be no private law, or law of any kind, because there could be no organised society. It was in this sense that it was understood by the Romans, and by the races which supplanted them, down to the latter part of the middle ages. It was in this sense, also, that the Greeks regarded it; and it was to the development of this particular branch of jurisprudence that the energies of the Greek mind were directed, with an exclusiveness which has rendered the labours of the Greek publicists the complement of those of the Roman jurists.

But it is not in this sense alone that public law is known to the modern world. When the Roman Empire of the West was broken up, and the vast territories, which for generations had been governed according to an almost uniform system, were divided into independent and, in internal organisation, dissimilar states, some sort of arrangements for facilitating their mutual intercourse became a positive necessity. This necessity, which first made itself felt in the relations of trade, and gave rise to a series of international codes of commerce, gradually extended itself to other relations, and at length was recognised in the shape of a complete system of international jurisprudence. The maxims of universal justice on which this system was founded, were transferred from the domain of ethics to that of jurisprudence by a process precisely analogous to that which had taken place with the other branches of law. Just as, within the state, the general conscience of the citizens had fixed the point at which the compulsitor of law should be added to the sanction of in-

dividual approval or disapproval, so here the general conscience of civilised mankind determined the point at which a violation of justice should become a *casus belli*, and Christendom became one organised community, held together by the common recognition of a code which every succeeding generation rendered more explicit, and enforced with greater consistency. To the public law of antiquity there was then added a new branch peculiarly Christian and European, and international law took its place by the side of state-law.

Within the limits of this new branch of the science, moreover, a new subdivision arose; for though the whole subject of international law was regarded as belonging to public law, in the wider and looser sense, it was itself subdivided into public international law, properly so called,—or the doctrine of the relations of state to state, and private international law,—or the doctrine of the relations of the private citizens of independent states.

In its existing phase, then, as studied, and taught, and practised in Europe, the science of jurisprudence—in addition to private or municipal law, and to those general principles of justice which, forming as it were the debateable ground between law and ethics, lie at the foundation of all the departments of law—presents these three great branches:—

1st, Public law, properly and primarily so called, or the doctrine of the relation of the state to the citizen and of the citizen to the state;—nearly equivalent to what is understood in England by constitutional law. Under this branch, in addition to its more obvious subject-matter, would fall scientifically both criminal and ecclesiastical law.

The relation of colonies to the mother state, both political and financial, and all questions as to the extent to which the institutions of older societies ought or ought not to be imposed on, or adopted by, the rising generation of states, would form most important topics of discussion from a chair devoted to this subject. When we consider to how great an extent the destinies of those vast and populous nations which are growing up in our colonies may be affected by the views which our own countrymen of the middle class form on such subjects in early life, we shall feel that we can scarcely over-estimate the duty of supplying them with such guiding principles as may be eliminated from a careful examination of the previous experience of mankind.

2d, International law, in both its branches.

a. Public international law, or the doctrine of the relations of state to state, whether these relations be founded on positive Treaties, or on the recognised opinions and usages of civilised nations. Under this head diplomacy, or the rules by which the intercourse of civilised states is regulated, is usually discussed; and, in this country, the not less important subject of the principles which ought to regulate the intercourse of civilised with semi-barbarous nations, would also be legitimately embraced.

b. Private international law, or the rules which regulate the intercourse and fix the status of the individual citizens of different

states, commonly called the "Conflict of Laws." The importance of this branch is so well brought out in a Report by a committee of the Faculty of Advocates, to which we shall have occasion presently to refer, that we shall take the liberty of quoting a single sentence:—

"Transactions take their rise in one country, and have their close in another, in either of which it may become necessary that the relative obligations be proved, and put to legal execution. The decrees of the court of one country often require to be enforced in another. A man is born in one country, goes abroad and is married in another, and finally dies domiciled in a third, leaving behind him property of various descriptions, locally situated in several different states; and questions arise in these respective countries regarding personal status, as affected by the validity of the marriage of the deceased, and the legitimacy of his issue; or regarding the effect due to the *mortis causa* disposition which he may have made of his estate, or the power and authority of those whom he may have named tutors and curators to his children; or, in the case of intestate succession, regarding the rules which ought to govern it, in each respective country, regard being had to the kind of property locally situated there. These questions, and unnumbered others of a similar kind, being of constant occurrence, and forming a large and increasing portion of the daily business of our courts, it may justly be considered that Private International Law has so strong a claim to be made the subject of University instruction, that it only requires to be duly explained to an enlightened community in order to its being cordially acknowledged and conceded."

Now, putting aside for the moment all discussion as to the enlightenment or non-enlightenment of the general community, let us endeavour, as professional men, to appreciate the significance of the fact, that, in the only school of law which pretends to any sort of completeness, the whole study department of public law is simply *unknown*. It is not with it as with other branches of knowledge, where the question, whether or not they are *adequately* taught, has been recently asked, and answered in the negative. *One-half, at least, of the whole science of jurisprudence is not taught at all.* Nominally, no doubt, one chair for the teaching of public law does exist in the University of Edinburgh; and so far were our ancestors from being blind to its importance, that it was actually the *first* chair which they instituted when they began to form a school of law in Scotland. For more than thirty years, however, it has been a chair without an endowment and without an occupant, and half a century has elapsed since it was filled by an efficient teacher. It was with this fact full before their eyes, that the Committee of the Faculty of Advocates commenced those inquiries, to the results of which, as embodied in their very able Report on University Instruction in Law, we shall here very shortly direct the attention of our readers.

In a former Report on the Qualifications of Intrants, the Faculty had entered into the history of legal education in Scotland, and had explained, in a manner quite satisfactory to us, and by no means uncomplimentary to our ancestors, the causes which led to its present strange and unsatisfactory position.

From the very intimate relation which subsisted between this country and the Continent during the whole period which elapsed

between the wars of the Succession and the Union of the Crowns, it was not only the frequent, but the almost invariable practice, for those who aspired to the higher branches of the law, or indeed to the conduct of public affairs of importance, either lay or ecclesiastical, to complete their studies abroad. So consonant was this custom with the tastes and habits of Scotchmen, and so little inconvenience did it occasion to a people whose legal system was not only derived from the same sources as, but was actually modelled on, those of the Continent, and who were habituated, moreover, to the use of what was then the common language of the learned, that the formation of a legal school in Scotland seemed to be almost a work of supererogation. Many Scotchmen were resident at the foreign universities in the capacity, not of pupils only, but of teachers; and the youthful Scot of those days learned under the superintendence, and not unfrequently from the lips, of his fellow-countrymen, in France, Italy, or Holland, what it was needful for him to acquire, far more effectually, and with far higher advantages, than he could possibly have done in Scotland. What he brought home with him was not, as in the case when the same course is adopted in our own day, a mere accomplishment, precious for the theoretical conception of his profession no doubt, but more likely to impede than to aid him in its practice,—on the contrary, it was the very knowledge, *in the very shape* in which he was to use it in the practical conduct of affairs in Scotland. Those whom he found, on his return, engaged in the practice of the law and in the administration of justice—nay, the public functionaries of his country generally, whether laymen or ecclesiastics—had been trained in the very schools which he had quitted; and to them such foreign learning and continental modes of thinking and feeling as he chanced to bring along with him were kindly and familiar.

But all this was changed by the action of causes which we cannot here enumerate, and which we shall not venture to characterise either as fortunate or unfortunate events. It is sufficient for our purpose to know that the old continental ties, which had been rapidly relaxing for the last half century, were finally torn asunder by the wars of the French Revolution; and that, in two or three generations, Scotchmen of the middle classes, from being the most cosmopolitan, became amongst the most provincial of Europeans.

It now became plain that what could no longer be imported from abroad must be manufactured at home; and in the beginning of the preceding century the formation of a native school of law was commenced. The completion of the remaining half of the modest edifice which their great-grandfathers began to rear, is the task which lies more immediately before the lawyers of Scotland of the present generation. Should they succeed in thus supplying to their countrymen what is positively indispensable, if they are to be educated in Scotland, and at the same time to preserve their position amongst European nations, we may

hope that their more ambitious sons will yet erect in our ancient metropolis a school of law which Bonn, and Heidelberg, and Berlin, and Paris will be willing to acknowledge as a rival.

As regards the old Public Law Chair, at all events, the task of reconstruction will be facilitated by the materials which still remain. The present position of the endowment will be best explained to our readers by an extract from a memorial on the subject which was recently presented to Government, and for the accuracy of the statements contained in which, they have the guarantee of the name of the present very gifted Dean of the Faculty of Advocates:—

“This is the oldest of the Law Chairs in the University, having been founded and endowed by the Crown, as patron, in 1707. As it appears to the memorialists that the restoration of this chair to a state of efficiency is a thing which, in the circumstances, is not only easily attainable in itself, but might be made to supply an important part of the existing desiderata in University Instruction, the memorialists would beg leave to explain, shortly, the history and actual position of the chair.

“At the Revolution Settlement, as is well known, Episcopacy was abolished in Scotland, and Presbytery was established in its place. On the extinction of the Episcopal Office, the revenues of all the bishopricks of Scotland fell to the Crown. These formed a very considerable fund, out of which the Crown has, from time to time, made liberal grants for the advancement of religion and education in Scotland, and for other philanthropic national objects. But the fund is still far from being exhausted; and, after deducting all the grants hitherto made, the present amount of free revenue, accruing from the bishops' teinds or tithes (independently of bishops' rents and feu-duties), now in the hands of the Crown, is at least L.12,000 a-year.

“It was out of this fund that the Crown endowed the Professorship of Public Law, by a grant contained in letters patent of Queen Anne, passing under the Privy Seal, and dated 11th February 1707. The Crown then instituted the professorship, on the ground that it would be ‘of use and benefit to our ancient kingdom, to establish and settle a foundation for a constant Professor of the Public Law, and the Law of Nature and Nations.’ For the endowment of the chair, the Crown granted, ‘in all time coming, for ever, all and hail, the sum of L.150 sterling money yearly, to be uplifted furth of the first and readiest fruits and rents of the bishopricks of Scotland.’ The letters patent, accordingly, enjoined the collectors of the revenues of the bishopricks of Scotland, to pay the yearly salary of L.150, ‘out of the first and readiest’ of the fruits and rents above mentioned, to the Professor.”

“It would appear to have occurred to those who took the charge of the arrangements for establishing and endowing the Chair of Public Law, that, as the salary was made payable out of the bishop's fruits (or teinds) and rents, it would be convenient to follow the analogy of the practice as to ministers' stipends, by making an ‘allocation,’ or ‘locality,’ of the salary of L.150, upon the teinds of certain heritors, *nominatim*, each of whom should be made liable, out of the bishops' teinds due by himself to the Crown, for a certain proportion of the salary. But any application to the court for a decree of allocation would have been unsuitable, because the whole bishops' teinds were in the hands of the Crown itself, to whom it was competent to allocate, at pleasure, so much of the teinds due by individual heritors as it might think expedient.

“Accordingly, on 31st May 1707, additional letters patent, under the Privy Seal, were issued by Queen Anne, expressly for the purpose of allocating the salary of the Professor, upon the teinds of certain heritors, respectively, in the proportions specified in the *Letters of Allocation*. This proceeded on the narrative that it was for ‘the more effectual and better payment of the salary;’

and it empowered the Professor to prosecute each heritor named in the letters, for payment of the proportion of salary stated against him therein.

"The Letters of Allocation also contained a provision which was calculated to make the Professor's salary, *in after time, keep pace, in some measure, with the advancing progress of the country.* The chief part of the salary was allocated, not in money, but in the 'particular quantities of victual,' or grain, there specified; which were converted into money at the rates fixed in the Letters of Allocation. The rate fixed for the boll (or half-quarter) of wheat, for example, was L.6 Scots, or ten shillings sterling. At such rates, it required the allocation of a large quantity of 'victual,' or grain, to make up the salary; and when grain subsequently advanced in price, the annual value of the salary rose along with it. In this way it had reached the amount of L.350 per annum in 1802.

"In that year, the ministers of the parish of St Cuthbert's, Edinburgh, obtained a Decree of Augmentation of their Stipends. These stipends were payable out of the teinds of the parish; and it happened that the teinds which had been allocated to the Professor's salary, as already mentioned, were derived from lands in this parish, which had formerly been part of the revenue of the bishoprick of Edinburgh.

"In the relative and subsidiary Decree of Allocation, or Locality, obtained by the ministers of St Cuthberts, the greater part of the teinds which had been allocated to the Law Chair by the Royal Letters Patent, were anew allocated by the Court to the ministers' stipends. These stipends formed, by law, a preferable charge upon the teinds, being a fund properly burdened with the support of the clergy; and accordingly, the particular teinds in question were carried off from the Law Chair, and applied for payment of the ministers of St Cuthbert's parish."

Whilst we join most fervently in the prayer of the Faculty, that the old Law Chair may be restored to what we must regard as *its rights*, we join not less cordially in the enlightened opinion which they have expressed as to the total inadequacy of any one chair, or one professor, to represent all the departments of public law. The grounds of our opinion will, we trust, be sufficiently apparent from the sketch we have given of the subjects which belong to this wide field of inquiry; but, as the deliberate *finding* of such a body as the Faculty of Advocates merits, and will receive, a consideration far higher than can attach to any demonstration of ours, we shall conclude by a last extract from the Report to which we have referred so often:—

"In order to carry out fully the system of instruction which the Committee have considered it their duty thus to propose, it would seem necessary to obtain not merely the restoration of the Public Law Chair to a state of efficiency, with an adequate endowment, but also to procure a competent endowment for an additional Chair of Law. The new lectures which are suggested, appear to be too numerous and important to be imposed upon any one professor. . . . The Committee are well aware of the financial difficulties which are so often experienced in attempting to accomplish such objects. Nevertheless, they are fully persuaded that it is a duty which the Faculty owe to the country and to themselves, to state unreservedly what is most required towards making a complete National School of Law; and to rely that so great an object shall not be allowed to fail through the want of adequate countenance and support. . . . It would be difficult, since the date when law chairs were first endowed in the University of Edinburgh, to point to any public disbursement whatever, which was more honourable to those who sanctioned it, or has been more richly repaid in benefit to the country by which it was made."

MARRIAGE WITH A DECEASED WIFE'S SISTER.

BROOK v. BROOK.

OUR readers will perhaps recollect the remarkable judgment pronounced by the First Division of the Court some time ago, in regard to the legitimacy of a person born of the marriage between a man and the sister of his deceased wife.¹ The Court in that case sustained the legitimacy of the issue, upon the ground that he was legitimate by the law of the country where his parents were married, and where they had their *domicile* at the time of their marriage. The judgment proceeded upon the assumption that the marriage was null and incestuous according to the law of Scotland, and that if the Scotch law were to determine the question of status, the issue would be held illegitimate. The Court rejected the argument founded upon the doctrine laid down by Dr Story, that the courts of one country are not bound to recognise a status obtained in another country, if the status be derived from such a criminal connection.² The case, we understand, is under appeal, although we may observe that we do not see it in the list of causes in the House of Lords.

Since that judgment was pronounced, a case identical in circumstances, except on one point, has occurred before Vice-Chancellor Stuart, in England, who called in to his assistance, as assessor, the new judge of the Matrimonial and Divorce Court in London, Sir Creswell Creswell. This latter learned judge has just delivered a very able judgment, which we think it right—looking to the general interest of the question—to present entire to our readers. The only difference between the case (*Brook v. Brook*) on which this judgment was delivered, and that of *Fenton v. Livingston*, seems to be in the fact, that in *Brook v. Brook* the *domicile* of the parents at the date of the marriage was in *England*, although the marriage itself was celebrated at Altona. In *Fenton v. Livingston*, the *domicile* of the parents at the date of marriage, and the *place* of marriage itself, were the same, viz., England—by the law of which, prior to Lord Lyndhurst's Act, the issue of such a connection were legitimate, unless the marriage were declared null during the lifetime of both the parents.

As we read the judgment of Sir Creswell Creswell, it goes the length of refusing to recognise any legitimacy from an incestuous marriage, although the marriage itself and the domicile of the parents had continued to be all along in a foreign country which allowed the marriage, and recognised the status of legitimacy in the issue. In short, the offspring of two native inhabitants of Altona, who had continued in Altona all their lives, would be refused the status of legitimacy in England, seeing that by the law of England, since Lord Lyndhurst's Act, such marriages are void *ab initio*, and the children bastards.

¹ *Fenton v. Livingston*, 27th May 1856; 18 D. B. M. 865.² Story, §. 11.

The House of Lords must determine between these conflicting views.

OPINION.¹

CRESWELL, J.—In this case I have been called upon by V. C. Stuart to assist him by giving my opinion as to the validity or invalidity of a marriage solemnised at Altona, in the kingdom of Denmark, between William Leigh Brook and Emily Armitage, the sister of W. L. Brook's former wife, then deceased. In answer to certain inquiries, the chief clerk of the V.C. certified as follows:—
 "That W. L. Brook and Emily Armitage were respectively, up to and at the time of such marriage, and at the time of their respective deaths, domiciled in England, and that they had not any permanent residence in the country where they married; that the marriage between W. L. Brook and the said Emily Armitage was a lawful marriage according to the law of the duchy of Holstein; and that, according to the same law, the children of such marriage are legitimate children." Upon the latter part of the certificate it was observed in argument, that it must be taken as a certificate that such marriages between Danish subjects are good, and not that the Danish courts would hold them good when solemnised between the subjects of another country, domiciled in that country, where such marriages are prohibited by law. The opinion which I have formed in this case renders it unnecessary to inquire into that matter. For, even assuming that in Denmark the marriage now in question would be held good, I think that by the law of England it was invalid, and the children of the parties to it illegitimate.

The question depends upon the effect to be given to the statute 5 and 6 Will. IV., c. 54. By the first section it is enacted, "that all marriages which shall have been celebrated before the passing of this Act between persons being within the prohibited degrees of affinity shall not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit which shall be depending at the time of the passing of this Act," etc. The second section enacted, "that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever."

Now, putting the narrowest construction on the words of this statute, it certainly had the effect of rendering absolutely void all such marriages between parties within the prohibited degrees as would, without the aid of the statute, have been voidable by the Ecclesiastical Court. The question to be considered, then, is, whether the marriage under consideration would have been so voidable. Had it been celebrated in England, there could be no doubt that it would have been voidable. In *Sherwood v. Ray*, 1 Moore, P. C. C. 395, Parke, B., in pronouncing the opinion of the Judicial Committee, used this language:—"That marriage—viz., between a widower and his deceased wife's sister—having been celebrated between persons within the Levitical degrees, and prohibited from marrying by Holy Scripture, as interpreted by the canon law and by the statute 25 Hen. VIII., was unquestionably voidable during the lifetime of both, and might have been annulled by criminal proceedings or civil suit." And this statement of the law was fully adopted by the Court of Q. B. in *Reg. v. Chadwick*, 11 Q. B. Rep. 205. Indeed, this point was hardly disputed by the learned counsel who contended for the validity of this marriage. But they relied on the fact of the marriage having been celebrated in Denmark, where such marriages are held valid, and contended that by the law of nations questions of this sort are to be decided according to the law of the country where the marriage takes place; and many cases decided by most eminent persons were cited, in which that principle was said to have been recognised and to have received full effect. I forbear to enter into an examination of them at present, for in none of them was a marriage in question which was contrary to the law

¹ Reported 30 L. T. Rep. 184.

of God and Holy Scripture. In order to make the cases relied upon applicable to the present, it was necessary to show that the same respect would be paid to the law of a foreign country recognising a marriage contrary to what we deem to be God's law. No such decision can be found.

In the absence of any direct authority, writers on international law were resorted to, and many passages were read to the court from Story's "Commentaries on the Conflict of Laws." In sect. 113 he says: "The general principle certainly is (as we have already seen), that between persons *sui juris* marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is equally invalid everywhere." In sect. 113 (a) he says: "The most prominent, if not the only known exceptions to the rule, are those marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy; and those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country." Again, in sect. 114 he proceeds: "In respect of the first exception, that of marriages involving polygamy and incest, Christianity is understood to prohibit polygamy and incest; and therefore, no Christian country would recognise polygamy or incestuous marriages; but when we speak of incestuous marriages, care must be taken to confine the doctrine to such cases as, by the general consent of all Christendom, are deemed incestuous." To this latter passage I cannot give my assent. How is a judge, sitting in an English court of justice, called upon to decide whether a marriage be incestuous or not, to be guided in his decision? Surely, if the law of his own country has already settled what is incestuous or the contrary, by that he must be governed. Is he to inquire into the opinions of all other nations in which Christianity exists, and to adopt that rule which is ascertained to prevail among the greater number, and to say that it shall be acted upon in defiance of the law of his own country? This would, indeed, be enlarging the *comitas gentium* to an extent hitherto unheard of. For the purpose of deciding whether a marriage be incestuous or not, I feel bound to ascertain what is the law of England, and to give effect to it. Examining that law, I find that, according to many decisions, such marriages are held to be prohibited by Holy Scripture, that they are within the degrees of affinity prohibited by God's law, and punishable as incestuous, and must therefore here be deemed to fall within the exceptions stated in Story, sect. 113 (a), and not to be recognised in this Christian country. If that were otherwise, and we were bound by the *comitas gentium* to hold this a good marriage, this consequence would follow: an Englishman domiciled in this country, cohabiting with the sister of his deceased wife, whether he has celebrated a marriage with her or not, is deemed to be guilty of incest, and punishable by our ecclesiastical law; but, by taking a short voyage to Denmark, and celebrating a marriage there, he would acquire the privilege of returning to this country, and maintaining an intercourse by our law deemed incestuous, with perfect impunity. These considerations satisfy me that the marriage would have been voidable before the statute 5 and 6 Will. IV., c. 64, was passed, and that by force of that Act it was absolutely void to all intents and purposes.

This opinion as to the voidable character of the marriage in question, although celebrated in Altona, makes it not absolutely necessary that I should express any opinion upon another question which was discussed with much learning and ability—viz., whether the general expressions that have on various occasions fallen from the most eminent judges in this country as to the validity of marriages here, if valid in the country where celebrated, are to be construed in the widest sense which can be ascribed to them according to the ordinary meaning of the English language, or whether they are to be limited and restrained by an implied proviso that such marriages are not contrary to the laws of this country. Nevertheless, as it is a point which, if settled one way, would dispose of the case, although my opinion, already expressed, should be held to be erroneous, I think I ought not to avoid entering

into the question; and I do so with the less hesitation, as my opinion on this very important subject will be open to review, and no doubt will be reviewed in this very case. Sir George Hay, in pronouncing judgment in *Harford v. Morris*, 2 Hagg. Consist. Rep. 423, expressed an opinion that marriages of English subjects having an English domicile, celebrated in other countries, have been held valid, not merely because they would be valid according to the laws of those countries, but because they were not contrary to the law of England. In page 434 he says: "I do not say that foreign laws cannot be received in this court in cases where the court of that country had a jurisdiction, or that this court would not determine upon those laws in such a case. But I deny the *lex loci* universally to be a foundation for the jurisdiction, so as to impose an obligation on the court to determine by those foreign laws." The judgment in that case was reversed, but upon grounds wholly irrespective of the opinion above cited. It therefore remains of such value as the reputation of the learned judge by whom it was pronounced can give to it; and in *Warrender v. Warrender*, 2 Cl. and Fin., there are some passages delivered by Lord Brougham which throw much light on this question. In one place he says, "The general principle is denied by no one, that the *lex loci* is to be the governing rule in deciding upon the validity or invalidity of all personal contracts." In another place he says: "A marriage good by the laws of one country is held good in all others where the question of its validity may arise; for the question always must be, did the parties intend to contract marriage? and if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely be considered otherwise than as intending a marriage contract. The laws of each nation lay down the form and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract." The noble Lord, having used the general terms found in the first sentence quoted, by that which follows shows that he meant to apply them only to the forms and solemnities of constituting a marriage, and to the proof of the parties having made a contract; for he afterwards says: "I shall only stop here to remark that the English jurisprudence, while it adopts the principle in words, would not perhaps be found very willing to act upon it throughout. Thus, we should expect that the Spanish and Portuguese courts would hold an English marriage avoidable between uncle and niece, or brother and sister-in-law, because it would be clearly avoidable in this country; but I strongly incline to think that our courts would refuse to sanction, and would avoid by sentence, a marriage between those relations contracted in the Peninsula under dispensation, although beyond all doubt such a marriage would there be valid by the *lex loci*, and incapable of being set aside by any proceedings in that country. But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract and the meaning of the parties—that is, the existence of the contract in its construction."

The case of *Reg. v. Lolley*, Russ. and R. C. C. 237, although not directly in point, almost compels me (if it be good law) to adopt that opinion. The case was this:—An Englishman married in England; he afterwards went to Scotland, and obtained a divorce there, which, according to the law of that country, dissolved the marriage. He then returned to England and married another woman, the first wife living, for which he was indicted, tried, and convicted. The propriety of that conviction was argued by very able counsel before the twelve judges, and by their unanimous opinion was held to be correct. The English court, therefore, would not recognise the law of Scotland because it was contrary to our own. But it may be said, the matter then in question was the dissolution of the marriage, not the constitution of it. True; but had the constitution of a marriage been in question, and not the dissolution, the result must have been the same. By the 9 Geo. IV., c. 31, sect. 22, it was enacted, "that if any person, being married, shall marry any other person during the life of the first husband or wife, whether the second marriage shall have taken place in England or elsewhere, every such offender shall be guilty of felony."

Now, suppose after the Scotch divorce the man had married again in Scotland, that marriage would have been good there; would it therefore have been good here? If it would, then the man might have returned to England with his second wife, and had two lawful wives living at the same time by marriages held to be valid by our own law. Some rather embarrassing questions would have arisen out of such a state of things. Would both wives have been dowable? If the second had had a son born, and the first had had a son born afterwards, which would have been heir to the father? And, besides all these strange questions, the father would have been indictable and punishable as a felon, by the express words of the statute, for having contracted a marriage which, by the law of this court, was perfectly legal.

In addition to these reasons for supposing that the learned persons who used the general expressions so frequently brought to our notice during the argument, did not intend that they should have the widest sense of which the words were susceptible, there are some passages in Huber's *Prælectiones Juris Civilis*, which show that, in his opinion, the *comitas gentium* did not require so large an effect to be given to foreign law. In his chapter *De Conflictu Legum*, he states, in sect. 2, 3d axiom:—"1. *Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant, nec ultra.* 2. *Pro subjectis imperio habendi sunt omnes qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur.* 3. *Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium prædicetur.*" "§ 8. *Matrimonium pertinet etiam ad hæc regulas. Si licitum est eo loco ubi contractum et celebratum est, ubique validum erit effectumque habebit, sub eadem exceptione prejudicii aliis non creandi; culicub licet addere si exempli nimis sit abominandi: ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit.*" Further on he writes:—"Brabantus, uxore ductâ dispensatione pontificis, in gradu prohibito si huc migret, tolerabitur; attamen, si Frisius cum fratris filiâ se conferat in Brabantiam ibique nuptias celebret, huc reversus non videtur tolerandus; quia sic jus nostrum pessimis exemplis eluderetur." There are other passages to the same effect. John Voet, Paul Voet, Sanchez, Gayk, and other jurists, say that the validity of a marriage is to be decided by the law of the country where it is celebrated; but they explain, that their operation extends only to the formation of the contract, and the form and ceremonial of the marriage.

I now proceed to examine some of the general *dicta*, that a marriage valid by the law of the country where solemnised is valid everywhere. The first case cited was *Roach v. Garvan*, 1 Ves. sen. 157. The facts of the case are thus stated:—Major R.—having two daughters, one born at Fort St George, in the East Indies, and the other at St —, near it, sent them to France for their education, and put them into a nunnery. Mr Quan, one of the persons in whose care they were left, married the eldest, who was then about eleven years of age, to his son, not then seventeen. Quan petitioned for cohabitation with his wife. Another petition about guardianship and fortune was also before the court. Lord Hardwicke said:—"As to the fact of the marriage, if good, the court will take care that the husband makes a suitable provision; but the most material consideration is as to the validity thereof. It has been argued to be valid from being established by the sentence of a court in France having proper jurisdiction; and it is true that, if so, it is conclusive, whether in a foreign court or not, from the law of nations in such cases." There is nothing in that case to show that if the parties had been British subjects domiciled in England, and it had been contrary to our law, and the courts of this country had been called upon to adjudicate with regard to it, they would have held it valid. The next case in order of time was *Scrimshire v. Scrimshire*, 2 Hagg. Cons. Rep. 395. These two British subjects had been married in France. A suit was instituted here for the restitution of conjugal rights. The validity of

the marriage was denied, as being a foreign marriage not celebrated according to the laws of the country in which it was contracted; and a sentence of the Parliament of Paris, declaring the marriage null, was also pleaded. Dealing with that question, Sir Edward Simpson, in giving his judgment, said, "The court was of opinion then (alluding to some earlier proceedings in the case), and still is, that a foreign sentence alone could not of itself be a bar to entering into a consideration of the question, whether this marriage between English subjects was good or not by the law of England;" and in pages 408 and 411, where their expressions of similar import are to be found: but the question before the court was, whether the contract had been made in a form binding by the law of France, and whether the marriage rites had been duly celebrated according to that law—no question as to any violation of English law being involved in the discussion. The case of *Ruding v. Smith*, 2 Hagg. Cons. Rep., was also cited, on account of one or two passages in the judgment of Lord Stowell. One of them runs thus:—"It is true, indeed, that English decisions have established this rule, that a foreign marriage valid according to the law of the place where celebrated is good everywhere else. It is therefore certainly to be advised that the safest course is always to be married according to the law of the country, for thus no question can be stirred." But here again Lord Stowell was dealing with the marriage ceremonial, and not with any inquiry whether such a marriage was or was not a violation of the law of this country.

But the celebrated case of *Dalrymple v. Dalrymple* was mainly pressed upon our consideration on account of the passage in which Lord Stowell enunciated the principle on which that and similar cases should be decided. It is in 2 Hagg. Cons. Rep. 58:—"Being entertained (said the learned judge) in an English court, it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." But what were the questions raised? Whether Captain Dalrymple had entered into a contract of marriage, and whether that which took place between the parties constituted a marriage in fact according to the law of Scotland; and those were the two questions with which the learned judge, throughout his elaborate and learned judgment, was dealing. It was not, and could not be, contended in that case, that a contract of marriage made by a minor in Scotland was contrary to the law of England, nor that the sufficiency of the marriage ceremony was to be judged of by any other law than that of Scotland. It has been supposed that Scotch marriages between minors are contrary to the Marriage Act, 26 Geo. II., c. 33; but that is a mistake, for the 18th section contains *inter alia* this proviso:—"That nothing in this Act contained shall extend to that part of Great Britain called Scotland, etc., nor to any marriages solemnised beyond the seas." Why, then, should it be assumed that the learned judge used the expressions relied on in a sense more extensive than was necessary for the decision of the case before him? Is it not more reasonable to suppose that he used them *secundum subjectam materiam* to enunciate the principle upon which he was about to decide the questions involved in the case under consideration, and not with reference to another question which had not been, and could not then be raised? I certainly am disposed to apply to them the same canon of construction which, in fairness and candour, should be applied to all judgments, rather than to assume that they were intended to have a larger meaning, in opposition to the writings of Huber, and extending far beyond the principle laid down by John and Paul Voet, by Sanchez, and by Gayll. The writings of these jurists were, no doubt, well known to Lord Stowell; and it is hardly to be supposed that he would have expressed an opinion at variance with theirs, without condescending to notice their writings.

and to explain his reason for differing from them. I have found nothing to justify giving the more extensive meaning to the words of Lord Stowell, except some passages in Mr Justice Story's work on the Conflict of Laws, and a decision cited by him from the reports of the Court of Massachusetts; and, perhaps, this greater force given in one of the United States to the laws of another at variance with its own, may be accounted for by the greater inclination that would naturally exist to give a larger scope to the *comitas gentium* between the different States of the Union, than could be expected to find place among nations wholly independent of and unconnected with each other. I have therefore come to the conclusion, that a marriage contracted by the subjects of a country in which they are domiciled in another country, is not to be held valid, if, by contracting it, the laws of their own country are violated.

Another question remains to be considered—viz., whether the 2d section of the statute 5 and 6 Will. IV., c. 54, taken by itself, is so framed as to be binding on all English subjects wherever they may be; or, in other words, whether it is personal, and accompanies the person of an English subject into foreign lands. It is in these words:—"Be it further enacted, that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever." The words, in their common and ordinary sense, would extend to marriage wherever celebrated; otherwise some only, and not all, would be rendered void. It is a statute affecting persons, and may be read as if it had been:—"If hereafter any persons (that is, British subjects) within the prohibited degrees contract marriages, all such marriages shall be void." A law framed in such terms would attach upon the persons of British subjects, and accompany them to all parts of the world. Upon this point the decision of the H. of L. in the *Sussex Peerage* case appears to be conclusive. By the 12 Geo. III., c. 11, sect. 1, it was enacted, "that no descendant of the body of his late Majesty King George the Second (other than, etc.) shall be capable of contracting matrimony without the previous consent of his Majesty, his heirs or successors (signified in a certain specified manner); and that every marriage or matrimonial contract of any such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever." In expressing the opinion of the judges on the question referred to them, Lord Chief Justice Tindal says of this enactment: "The words of the statute itself appear to us to be free from ambiguity. The prohibitory words of it are general, 'that no one of the persons therein described shall be capable of contracting matrimony;' and again, 'that every marriage or matrimonial contract of any such person shall be null and void to all intents and purposes whatsoever.' The statute does not enact an incapacity to contract matrimony within one particular country and district or another, but to contract matrimony generally and in the abstract. It is an incapacity attaching itself to the person of A. B., which he carries with him wherever he goes." And further on he says: "The words employed are general, or more properly universal, and cannot be satisfied in their plain literal and ordinary meaning unless they are held to extend to all marriages, in whatever part of the world they may have been contracted or celebrated." The whole passage might have been written with reference to the enactment now under consideration. This statute does not enact an incapacity to contract matrimony within the prohibited degrees within one particular country and district or another, but to contract such marriage generally. The object of the statute was to put an end to all such marriages between English subjects for the future, and cannot be satisfied by any narrower construction. On this ground, therefore, as well as the other two urged by the counsel of the Crown, I am of opinion that the marriage celebrated between William Leigh Brook and Emily Armitage, at Altona, was void, and the children of those two persons illegitimate.

THOUGHTS ON LAW REFORM.¹

LETTER FIFTH.

LET me, before proceeding any further, supply an omission in my last communication.

I was unaware that a second reduction of the Torbanehill lease had been brought into court, through the door left open by the judgment of the Inner House upon the first reduction. The second action was raised on 29th April 1856. In substance, its object was to solve the same controversy, whether or not the defender had obtained his lease by fraud. The statement was so far improved and strengthened as to assert a positive and direct, instead of a merely speculative, knowledge by the defender of facts said to have been concealed and misrepresented by him, with the view of obtaining the lease. The Lord Ordinary, after a preliminary judgment on the question of *res judicata*, was of opinion that the new case might go to trial; and on the 26th of June last, the Inner House, *dissentiente* Lord Deas, affirmed that judgment.

Both the judgments of the Inner House, I am now informed, are under appeal to the House of Lords.

Thus the question being judicially raised in March 1854, whether or not the lease was fraudulently obtained, the facts on which that question turns are not (March 1858) ascertained yet; and it would be rash indeed to predict within what time they will be. Plain men, unaccustomed to the niceties of legal pleading, might say with some force, that if, upon the facts, the pursuer was entitled to have the lease swept away as fraudulent, or if, upon the facts, the defender was entitled to keep his lease free from any imputation of fraud, the first step in logic and in common sense (these being convertible terms) was to ascertain the facts. The field of proof was quite capable of being sufficiently measured and defined by the conclusions of the summons; and the question, whether the proved facts did or did not justify these conclusions, might have been decided once and for ever in one suit. By the dismissal of the first action on averment instead of proof, the pursuer received pretty direct encouragement to try a second appeal to the courts of law.

I return now to the question, Who ought, under the changes I propose, to be sole judge in the first instance?

In any claim for the recovery of a sum of money above a certain amount, a pursuer, under the law as it now stands, has the option of bringing his action, in the first instance, either in the Supreme Court or in the Inferior Court. The sheriff-substitute is judge *primæ instantiæ* within his own district; to that extent he has a cumulative jurisdiction with the Lord Ordinary, whose powers extend to the

¹ Vide *supra*, vol. i., pp. 346, 414, 462, 555.

whole territory of Scotland. In the case just mentioned, and in some others, a pursuer can make his election between these two tribunals.

There are many considerations which may affect his choice. If the question be mercantile, and arises in a mercantile community out of Edinburgh, if it turns upon disputed facts as well as disputed law, and if both parties be anxious to avoid the expensive uncertainties of a jury trial, the case will probably begin in the Sheriff Court. The existence, around that court, of an able and influential body of local practitioners will contribute to this result. So will the natural feeling of every litigant in favour of law brought, to use a common phrase, home to his own door.

I state this as no more than a probability; for there are disadvantages attending this course which may turn the litigant's choice the other way. From the sheriff-substitute there lies an appeal to the sheriff; and, till the recent Sheriff Court Act was passed, there was in all cases an intermediate step of appeal to the Lord Ordinary, before the Inner House was reached; whence the cause may still go to the House of Lords. If the question be one of fact, there is presented the anomaly of judges who have not seen the witnesses, successively reviewing the judgment of one who has. These are the formalities and delays of a process of advocacy to be successfully gone through. To many men, an action brought at once before the Lord Ordinary, in the first instance, will seem the shorter and simpler course.

In many cases that course must be followed. Questions affecting the ownership of heritage,—questions of status, declarators and reductions,—all these are incompetent in the Sheriff Court. There are some legal questions which the Inner House can alone decide in the first instance. I do not stop to notice these in detail; observing only, that in the summary jurisdiction of interdicts, and, to some effects, in the bankruptcy jurisdiction lately established, the sheriff, in his own district, has a cumulative jurisdiction with the Lord Ordinary.

Is it good for the public,—is it good for the profession, that this anomalous condition of our primary jurisdiction should continue? Would it be an evil for both to substitute in its place one plain and uniform rule, by making the sheriff sole primary judge in every lawsuit, with an easy and simple form of appeal to the Court of Session, in every case beyond the jurisdiction of the Small Debt Court? This proposal is not so new as not to have been before now matter of discussion and objection. Not overlooking such objections as I have heard, let me, in the first place, distinctly state what my proposal is.

In endeavouring to be clear, it is, as every one knows, difficult to avoid a dogmatic form of expression; but I am so anxious in this matter to attain clearness, that I shall take my chance of being charged with dogmatism and presumption. I shall even assume, for

a moment, the language of an omnipotent legislature. Take the sheriff as sole primary judge in all lawsuits, whatever be their nature or amount. Send him away from the Parliament House to reside permanently in his district for that purpose. If the district be populous, and the business require it, send two, or three, or four sheriffs; this, however, is matter of detail. Having established the sheriff with these powers, relieve him from his duties of superintending police and county business, and from any ministerial or administrative function. These can safely be left to the paid inspectors of police, and to the great body of unpaid and influential magistracy to be found in every shire. Make the duties of the sheriff within his district, whether civil or criminal, to be judicial only. Remove the sheriff-substitute from below him, and the Lord Ordinary from above him. Give direct appeal from his decisions to the Court of Session, sitting henceforth exclusively as a Court of Review; the Outer House being converted into a Third Division. Let the appeal be no more by process of advocacy, but by simple enrolment, bringing up the cause as fully and as unrestrictedly before the Court of Review, as it was before the Court below; the facts only to be held finally determined by the parties' note of admissions, or by the sheriff's verdict, if no motion be made for a new trial. Add to this a provision, for which many voices in the profession would willingly be upraised, that the Supreme Court should sit eight months in the year, and begin its daily work at ten o'clock in the morning, instead of eleven.

I have already explained, by unavoidable anticipation, what materials I would place before the Court of Session, thus exclusively constituted as a tribunal of review. There would be the conclusions of the summons. I purposely leave out the parties' averments and pleas: these have served their purpose before the judgment under appeal was pronounced; at this stage they are useful no longer. In the next place, there would be the parties' note of admissions, or failing this, there would be the sheriff's verdict, containing distinct and articulate findings in point of fact, together with all writings, deeds, and documents, therein referred to. In the event of a motion for a new trial, there would be the sheriff's notes of the evidence taken by him. Lastly, there would be before the Court the sheriff's decree, containing distinct and articulate findings in point of law. These, in my view of the matter, would constitute the "closed record," on which the Court of Session would hear argument and pronounce judgment.

Under our present system, the Inner House judges are supplied with printed copies of the Outer House pleadings and judgment before the case is heard; and, in practice, they consider it their duty to study these papers carefully before the hearing. The main advantage which is urged in support of this course is, that the case may be heard and determined at one sitting; a result not always

attained, but which, when attained, saves some expense to the parties. The disadvantage of this arrangement is, that the case is sometimes decided in the minds of the Court before parties are heard. Indeed, it is sometimes curious to witness the rapidity with which a case is at this stage disposed of, after lingering in the rolls for months and years in its preliminary stages. In the Outer House, on the other hand, the merits of the cause are, for the most part, new to the judge when the debate begins. On this very account, it is not an uncommon remark, that so far as the full and thorough discussion of the pleas of parties is concerned, an Outer House debate is more satisfactory than a hearing in the Inner House.

Were the Court of Session to be made, as I have proposed, exclusively a tribunal of review, parties being entitled to maintain, without formal notice before that Court, any plea which the materials of judgment already enumerated could legally support, it would be necessary that the debate should be carried on there, under those conditions which now insure a full and complete discussion of the merits in the Outer House. I would propose, then, that the papers be placed before the judges when the debate opens, and not before. No doubt this may lead to an adjournment; and to the litigant, an adjournment is an exaction of more time and more money. I readily acknowledge this, and meet the objection, as English lawyers say, by confession and avoidance. If, by the system I propose, an enormous delay be saved in the preparation of the cause—a delay not to be reckoned by weeks or months, but by years—the parties will not grudge a delay of two or three days,—a delay not given to formal preparation, but to full and complete discussion of their lawsuit upon its merits. For I claim it as a characteristic feature of any plan in contradistinction with our existing system, that more time shall be given to the deliberate consideration of the cause, and that less time shall be wasted in its formal preparation. Full time being given for careful decision, I take it as one perfection of any judicial system, that it reduces all other delays to the least attainable minimum.

I cannot insist too strongly on this matter of economy of time. A saving of time is, in many obvious respects, a money-saving also. The capital of a mercantile man, or a large portion of it, may, under our present system, be locked up for years. A merchant, we shall suppose, justly demands a large sum from his debtor. The latter, desirous of obtaining time, resorts to a sure device for getting it. He forces his creditor to seek recovery in our courts of law. The pursuer obtains a clear judgment in his favour in the Outer House; there being appended to the judgment of the Lord Ordinary a note, making manifest the worthlessness of the defender's pleas, and the scandalous dishonesty of the defence. The defender reclaims. More than a year will elapse before the pursuer can obtain his obvious rights. But he is a mercantile man; he has an opportunity of turning his money to excellent account if his money were in his hand. He proposes to abandon a third of his claim; he obtains an

immediate settlement on those terms, which set in a clear light the good policy of dishonesty. Is this a pure figment? Do any of my readers, having experience in legal proceedings, know nothing of any such cases?

When a man is aggrieved, he is for the most part willing to pay for redress. He is willing to pay handsomely if the redress offered is likely to be expeditious and effectual. But when the litigation lingers, his indignation cools; his very soul sickens at the interminable delays which must elapse before his cause can get a hearing on the merits, or before he can call his own the judgment which the first judge has pronounced in his favour; and so he comes to terms. I believe that, in nine cases out of ten, what a litigant grudges are not the handsome fees he pays to his lawyers,—of these he expects ultimate reimbursement from his adversary; but what tortures him is the time during which he must wearily await redress. He would pay well, even with small chance of repayment, if by doing so he could expedite the result. Most men do not, for the sake of economy, put themselves in the hands of a dentist who will make them suffer lingering agonies in the extraction of a diseased tooth; a rapid operation is the very thing for which they will pay a high fee to a superior practitioner.

The notorious delays of our procedure induce many a man to submit to wrong rather than seek judicial redress. They drive many into arbitrations, which hold out hopes of a speedier settlement, not always fulfilled. There is no surer sign of want of confidence in our public tribunals, than the decided preference manifested for the private tribunal of an arbiter. The prevalence of arbitrations cannot, however, be taken as an adequate measure of the evil; for, as already said, there are many who, in their not altogether groundless dislike of other means of redress, submit to what they consider as an injury. Some unthinking people will occasionally be heard to praise our judicial system on this very account. Litigation is an evil, they say: let us rejoice that the expense and delays of our system have at least this good result, that they discourage litigation. To be consistent, such persons should denounce every amendment in the machinery of our tribunals as an evil. The more undoubted the reform, the more fatal the mischief done to society. Because litigants earnestly pray for some obvious improvement, you must on that very account persist in its stern refusal. If these reasoners profess any obedience to logic, they must hold bad tribunals and worse pleading as a public good, and do their best to obtain and perpetuate both the one and the other. There is no third way between that course, and making your Jurisprudence of Remedy as simple, as cheap, and, under the qualification so frequently given, as expeditious as you can.

It is, however, a mistake in point of fact to suppose that every kind of litigation is discouraged by expensive and dilatory forms of procedure. No doubt, they do tend to keep out from the courts of

law those questions of right between man and man, which the complex relations of civilised life and the development of commercial prosperity render unavoidable. But where the object of a litigant is oppression, such forms of law are an instrument lying ready to his hand. The simpler, the cheaper, the more expeditious the legal remedy, the greater every man's security against this and every other kind of legal wrong.

I have alluded to the demand which has almost become a public cry (it is so difficult for litigants to get up a public cry!), that the sittings of the Supreme Court should last during a greater period of the year, and should begin at an earlier hour each day. The time that a cause lingers in court owing to the crowded state of the rolls, can scarcely be esteemed a benefit, except in the estimation of such reasoners as I have just alluded to, who hold it to be socially expedient that litigants should undergo hardship *pour encourager les autres*. One obstacle to extended sittings of the court would be removed if civil jury trial were at an end. But the Circuits would remain as another, and still more formidable obstacle. Let us see whether it be insuperable.

Any one who watches the proceedings of our Circuit Courts, will see that by far the greater number of cases which they try, differ from the ordinary Police and Sheriff Court cases in nothing but the number of previous convictions which aggravate the charge in each libel, so as to make it a transportable offence. To the accused, the result of his first trial before a Police Court is, in one sense, much more important; for, although his sentence could not then exceed sixty days, the conviction may have sealed his fate for life. When, at the usual stage in such a career, he is at last brought to the bar of the Circuit Court, the evidence is often so simple and clear, that the prosecutor leaves it to the jury with few words of comment, or with none at all. The sentence is the merest matter of routine, and can generally be predicted with tolerable certainty before it has passed the judge's lips. Is it fit that the highest judicial talent in the country should be taken away from its usual and most important field of labour, to dispose of such cases as these?

Withdraw these cases from the Court of Justiciary, and the judges of that court will never require to leave Edinburgh to try the more important ones which also figure in the circuit calendar. Their ordinary sittings in town will be amply sufficient to try all the capital cases which occur throughout the country, besides all those to which, though not capital, it may, on grounds of public expediency, be thought fit to assign the honours of a more solemn trial. Why should not the public prosecutor have it in his power to send the ordinary run of thefts, robberies, and housebreakings to the sheriff and a jury, when, in consequence of previous convictions, he desires to obtain a sentence of transportation? Most of them present so little difficulty as to fall readily within the most ordinary routine of official duty. Why should the public

prosecutor be obliged to resort to the Supreme Criminal Court to try them? Give the sheriff power to dispose of them, by extending his jurisdiction to sentences of transportation for fifteen years, and circuits may be numbered among the things that were. The public prosecutor's power of selecting between the Court of Justiciary and the Sheriff Court; the right of appeal by suspension; the presence of the very same jury who at present, as an essential element of the Circuit Court, decide the question of conviction or acquittal;—these are surely ample guarantees against the sheriff's abuse of powers, not greater than those still entrusted to a bench of English country gentlemen, sitting as justices at Quarter Sessions.

The fact, that circuits are an obstacle to extended sittings of the Court of Session, has necessarily led to this digression into criminal procedure. I return to consider, in a very few words, the objections commonly made to an extension of the sheriff's civil jurisdiction. These objections all resolve themselves into this,—that the cases at present beyond that jurisdiction are too important to be brought within it. No matter that the sheriff's power of trying petitory actions affecting moveables be absolutely without limit; men who, in such matter, obey the guidance of routine more than that of reason, could not endure that the sheriff should pronounce a decree of declarator, or of reduction, or should construe a deed of entail. My answer is,—why should he not do so, if his judgments are subject to a short and simple process of review? In some cases, the parties might acquiesce in his decision; in all, he would have the salutary prospect of a possible appeal before his eyes. And so the Supreme Court would best fulfil what I conceive to be its true function, by regulating, as the heart of our whole judicial system, all the inferior judicatories of the country.

I reserve for my next communication the consideration of some additional guarantees of sound decision.

ICTVS.

INDICTABLE FRAUD.

THE present is a favourable time for inquiring what protection is afforded by our criminal law, in its present state, against the various species of dishonesty prevalent in the commercial world. We have already devoted several articles to the examination of the circumstances in which relief is given, when fraud enters as an ingredient into a contract; and it may not form an improper conclusion to the series, to ascertain how far our criminal law is sufficient to reach those reckless and dishonest persons who have contributed so largely to the commercial disasters which we have lately had to deplore.

In the course of the recent judicial examinations of several bankrupts, especially in Glasgow, it has been elicited that they have been in the habit of obtaining delivery of goods on credit, when

they were in a state of hopeless insolvency. Now, assuming that their insolvency was known to themselves when they took delivery of the goods, as must have been the case, is the receiving of the goods, when they knew they had not the means of paying for them, punishable by our law as fraud?

Mr Burnet, in his Treatise on the Criminal Law, states, at page 165 :—"All those falsehoods and frauds by which another is deprived of his property under artful and false pretences, particularly by substituting one thing for another, and by assuming a false name or character for the purpose of cheating and obtaining the money of others, or by using a false document as the instrument of deception, may be punished as crimes." This statement, however, has been modified and qualified by later decisions and dicta of the court; and we remark upon it :—

1. The assumption of a false name or character, or the substitution of one thing for another, or the use of a false document, is not essential to infer guilt of fraud. The author, indeed, does not go the length of saying that either is necessary. He only says that crime is committed, particularly when either of the fraudulent expedients referred to is resorted to. This only means that the proof of guilt is clearer, if the assumption of a false character or other device is established; and this is no doubt true; but neither is absolutely necessary to constitute the crime of fraud, as was decided in the case of Hall, to be hereafter noticed.

2. It is a sufficient false pretence to constitute the crime of fraud, that the person imposed upon is led to believe that the person ordering the goods is able, and intends, to pay for them. The general rule is, that every person who orders goods pays for them, either on delivery, or after a period of credit; and the man who orders goods, and leads the seller of them to suppose that this general rule will be followed, when, from the state of his circumstances, he knows very well that he cannot pay for the goods, either immediately or within a reasonable time, commits the crime of fraud. The essence of this species of fraud, in short, is the intent not to pay existing at the time of receiving the goods. A man may order goods, and fail to pay them afterwards, without committing any crime. But here the intention not to pay at the time of receiving the goods is absent. In the words of Lord Cockburn, in the case of James Hall and Others, 25th July 1849, J. Shaw, 260 :—"It is not going into a shop, and buying goods without paying for them, that constitutes the crime; that is often done innocently, for a man may be unable to pay. But the crime here is buying goods, and procuring delivery, *with the intention of not paying for them at the time*. It was the alleged dishonest intent charged which constituted the offence; and that, if proved, was enough."

It is sufficient, therefore, to constitute an indictable fraud, that another is deprived of his property under a false and fraudulent pretence; and the dishonest intent existing at the time, which has

loniously appropriated the said goods to his own uses and purposes; and no part of the price of the said goods has been paid to the said ; and the said have been thereby falsely and feloniously cozened and defrauded by the said James Hall." This charge was, after objection and discussion, sustained as relevant; the Court holding, in the words of the rubric of the report, "that it was not necessary to allege that the panel assumed any false character, or that he used any other false pretence than that of undertaking to make a cash payment of the price of the goods." Similar charges have since been sustained, particularly in the unreported case of David Gordon McLellan, at Glasgow, in spring 1850.

In this case of Hall there was alleged to be an undertaking by the panel to pay for the goods on delivery, or as a cash transaction. In most of the recent cases, credit has been given to the purchasers. But is there on this account any distinction betwixt the two cases? We submit there is not. If the fraudulent intention not to pay exists at the time of the purchase, the principle is precisely the same. Possibly the proof may be more difficult where credit has been given; but the fact that credit has been given, does not make the charge an irrelevant one. And this leads us to notice the objection, that it is impossible to prove this species of fraud. That it is not easy, we freely admit; that it is impossible, we distinctly deny. It is always a difficult matter to prove against a man what is passing within his own breast, but it is done every day. In a case of reset it is necessary to prove that the receiver knew the property to be stolen; this is the essence of the charge. Without such proof, the act of the resetter—if he be a broker, for instance—may have been done in the exercise of his usual calling, and is no more punishable than the act of the person who buys goods which at the time he intends to pay for,—an intention which subsequent misfortune prevents him from fulfilling. It is not for us to speculate upon how the Glasgow frauds are to be proved; but we would suggest, that the fact of a person buying goods from another, which he immediately thereafter hands over to a prior creditor at a reduced price, or lodges with a storekeeper in security of an advance of less than he has paid for them, for which advance he pays at the rate of 20 or 30 per cent., both of which methods of raising the wind have been disclosed in recent cases, would form no mean element of proof in the minds of a Scotch jury.

There is another class of frauds which has recently been brought very prominently before the public notice. It may be doubted whether they are such as to subject the parties to indictment and punishment; but this, at least, we have no hesitation in saying, that if our law affords no protection against them, it ought to do so. We refer to the system of obtaining advances on spurious accommodation bills. In what is understood to be the most common case—the case, namely, of a bill being presented to the bank bearing to be accepted by a person who does not exist, to which, in fact, the drawer has

adhibited a fictitious name—the offence is pure forgery; and several cases have occurred, where parties using such spurious documents as a means of obtaining credit, have been sentenced to lengthened periods of penal servitude. But the ingenuity of financiers has lately invented a still worse form of this wholesale species of robbery—a form by which the parties save themselves from the guilt and punishment of forgery, but, it humbly appears to us, do not escape from the penalties attaching to other offences recognised by the law. The system we allude to is that by which the bill is accepted by persons in London not worth a straw, who are paid a commission for the use of their name; and live handsomely by it. There must be something seriously wrong, when such frauds—for frauds on some one they undoubtedly are—can be perpetrated so easily. We cannot doubt that, if the banker who discounts the bills is assured, or led to believe, that they have been granted in the ordinary course of business, and that the acceptors have received value for them, an indictable fraud upon him is committed. But, suppose that the worthlessness of the acceptors of the bills is well known to the manager of the bank with whom the man deals, this would certainly alter the particular character of the offence; but we think there would be disclosed strong grounds for a charge against the manager, and the person dealing with him, of conspiracy to defraud the shareholders of the bank. Might there not also be a charge of “culpable and reckless discharge of duty” against the manager? We think some such charge was made in the Falkirk bank case at last Stirling Circuit, although it was withdrawn without any judgment on its relevancy.

Again, what shall be said of the conduct of directors of a joint-stock bank, or other company, who publish to its shareholders and the public statements which they know to be untrue,—who declare and pay dividends as the result of profits, when, on the contrary, large losses have been sustained during the preceding year,—who continue to carry on the business of the bank after a certain amount of the capital has been lost, in the face of an express enactment, that in that event the company shall be *eo ipso* dissolved,—and who studiously conceal the loss of capital from the shareholders and the public,—in consequence of all which the former are induced to continue, and some of the latter are induced to become, partners of the company, and responsible for its obligations? Can the men who work all this mischief not be punished for their misdeeds? If we apply Mr Burnet’s definition of indictable fraud to such misconduct, it will be found that falsehoods are told, frauds (in the ordinary sense of that word) are committed, others are in consequence deprived of their property, and the pretences held out are both “artful and false.” Taking his definition, therefore, to be accurate, we have here all the requisites of indictable fraud. But rather, we have at least one of the cases in which, “particularly,”

according to Burnet, the fraud is punishable; for are not the reports annually made by the directors, in which the *profits* are set forth, and the dividends recommended, "false documents"? It is said, there is no precedent for a charge in such circumstances. Possibly not. But has the case which we have pictured a parallel in the history of joint-stock banking? Again, it is said, the directors can be guilty of no indictable crime, because anything which they did was certain to injure themselves as much as others. But this is no sufficient excuse for their conduct. A man who breaks another's head is not justified by the fact that, in doing so, he endangered his own. And, besides, we know not when the directors intended to retire from the concern. The crash may have come sooner than they expected; and if concealment for another year had been successful, possibly the directors might have before that time retired from the company, and freed themselves from responsibility for its obligations.

Such being the state of the law, it is to be regretted that certain sets of speculators have been so long permitted to carry on with impunity the disgraceful system of trading which has lately been brought to light.¹ The existence of the practices to which we have alluded, and which the law of the land, as it stands, is amply sufficient to meet, inflicts a double evil on society. Not only are the immediate dupes of the swindler ruined: the honest trader is undersold and driven from the market by these persons, who in reality buy their goods for nothing; commercial confidence is destroyed, and a convulsion ensues, such as the one from the consequences of which the country is now slowly recovering. Either our law is sufficient to punish such frauds, or it is not; if it is not, the magnitude of the evil justifies the public in insisting to know, by a prosecution, wherein it is defective.

¹ There is one vice which, at least judging from recent revelations, prevails more widely than people suppose, and against which this society might wage effective war—I mean commercial dishonesty. As a British merchant, I feel inclined to hang down my head when I read of the wholesale robbery perpetrated on the public by men occupying high positions in the mercantile world, and of the facilities afforded for carrying on a system of plunder by too many of our banks. Both in theory and in practice there is a loose morality prevalent in trading circles, which must be frowned down and reprobated by the community, or it will become a cancer eating into the very heart of our national prosperity. I venture to think that very few men could for the first time put their name to a bill for which value had not been received, without having a certain still small voice rebuking the deed; and yet how many of otherwise irreproachable character seem scarcely able to comprehend that, whatever the law may say on the subject—and I feel the difficulty, if not the impossibility, of curing the evil by legislation—every such transaction is a fraud! May I be permitted to express a hope that this sad exposure of overtrading, reckless bill-drawing, and personal extravagance, may impress upon us all more deeply the folly, as well as the sinfulness, of departing from the path of commercial integrity, and of forgetting all other considerations in our too great haste to get rich.—*Speech at Glasgow of Mr Baxter, M.P.*

Review.

The Dunlop Succession Act.—Questions are beginning to occur on the interpretation of this important statute. It has now been nearly three years in operation, and, so far as we are aware, no case has occurred where the new rights which it brought into being required to be judicially determined. The litigation which springs from every new Act of Parliament requires time to germinate; but, judging from the number of cases sent up for opinion, the season of germination is now over, and the statute is beginning to bear fruit. The chief difficulty occurs with respect to the first section of the Act, which declares as follows:—"In all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person, who, had he survived the intestate, would have been among his next of kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person, and the issue of any such child or children, or of any descendant of such child or children, who may in like manner have predeceased the intestate, shall come in the place of his or their parent predeceasing, and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child or children, or of such issue, if he had survived the intestate, would have been entitled." In construing this clause, it is requisite to bear in mind what the object of the Act was. This has been stated by the very highest authority to be—"to do away the injustice of allowing one or more survivors in the same degree of kindred, and as such, next of kin to an intestate deceased, to carry off his whole moveable estate, notwithstanding the existence of issue of a predecessor in like degree of kindred, and who, if he had survived, would have ranked with them—the existing next of kin—as one of their number." In calculating the shares into which the deceased's estate is divisible, the practitioner should not be misled by taking into account those who hypothetically *might have been* next of kin if the intestate had died many years before. The first question is, Who are the next of kin actually existing at the date of the death of the intestate? The distribution takes place according to *their* number, *plus* the number of those who would have been in the same degree of kindred if they had survived. Thus, suppose A dies, leaving a brother B, and a nephew and niece by a predeceasing brother C: here B is next of kin, and the estate is divisible into two shares,—one-half to B, and one-half to the children of C; but, suppose B is also dead, then the next of kin are the children of C, and the estate is divisible according to their number; or if the intestate has also grand-nephews, by a nephew deceased, they of course take their parent's share. Such are the general cases which have occurred in practice. There is another point on which we believe the judgment

of the Court is about to be taken,—the meaning of the expression in the proviso of sect. 1: “Provided always that no representation shall be admitted among collaterals after brothers’ and sisters’ descendants.” Of this, various ingenious readings have been attempted; but the plain and obvious sense of the words, is to prevent representation going higher up than the same line as the deceased—*e.g.*, to exclude a cousin from representing an uncle: in other words, the only persons entitled to the benefit of the Act, are the descendants of brothers and sisters of the deceased. We may add (in answer to an esteemed correspondent), that it is altogether a mistake to suppose that this statute has anything to do with legitim. Legitim is an inherent right in the children, which no act of their parents can ever touch, and which it was never meant that this statute should at all affect. Accordingly, while the words of the principal section are broad enough to embrace every species of moveable succession, the operation of the measure is expressly limited to the dead’s part in the interpretation clause. “Moveable estate,” as used in the Act, is there defined to be, “the whole free moveable estate on which the deceased, if not subject to incapacity, *might have tested*, and which has been undisposed of by will, and any portion thereof so undisposed of.” Whether the very equitable principle of the Act should not be extended so as to embrace legitim, is a totally different question. If it is right, as Parliament in this Act has already declared, that the issue should be placed in the position of a predeceasing parent with respect to that portion of the estate which the deceased could have disposed of by testament, *a fortiori*, they are entitled to the same justice with respect to that portion of the estate which the law has declared shall be the inheritance of the children, indefeasible and imprescriptible.

Amendment of the Criminal Law.—Our criminal law has had the rare good fortune almost wholly to have escaped the meddlesome hand of modern legislation. We venture to submit to the new Administration the propriety of the following amendments:—

1. The High Court of Justiciary should be empowered to review the judgments of the judges on circuit, on questions of law and evidence; and the judge should be enabled to reserve a point for the opinion of the Court, as is the practice in England, and as so great an authority as Lord Cockburn so strongly recommended.

2. The fees on suspensions in Justiciary should be abolished; they are a relic of barbarous times, which should have been long since swept away. The most iniquitous of all taxes are taxes on justice, especially when they are imposed for the benefit of officials already amply remunerated. Their only effect is to place beyond the reach of the poor man that redress which the rich can obtain. At present, it is impossible to obtain a suspension of a judgment of a blundering bailie or rustic justice, without paying 5s. for lodging bill; 2s. for productions; 2s. 6d. for each sheet of bill; L.1, 1s. for

each diet of Court; and 10s. 6d. to the macers. Thus the mere outlay in the form of fees, not to speak of the fees of counsel and agent, may be L.8 or L.10,—an amount which few indeed of those for whose benefit suspension was introduced, are in a position to raise.

3. The system of two diets might, with advantage, be introduced into the practice of the Justiciary Courts. The double diets introduced into the Sheriff Courts by Lord-Advocate Moncrieff, is admitted on all hands to have been a vast improvement, in many respects. It saves time, and trouble, and expense to jurymen, in respect that *they are not cited unless required*: it saves trouble and time to the witnesses, who, in many cases, are never required to attend: it saves the country much expense, in citing jurymen, paying unnecessary witnesses, etc., etc.

To show how much it is needed, let us direct attention to the procedure at the last Jedburgh Circuit. It was fixed for the 10th September. There were four cases for trial. Forty-five jurymen were summoned, drawn from four different counties, and sixty or eighty witnesses. Let it be borne in mind, at the same time, that the weather was very wet. On the 10th September, all four prisoners pleaded guilty. The court was over in an hour: not a jurymen or a witness was required. Many of the jurymen had left home early the previous day, and travelled, some of them, we understand, fifty and sixty miles in the rain, across country roads, at considerable expense, at great inconvenience, and all for no purpose. The witnesses, too, had come long distances, several of them from England, needlessly. But, in addition to this, they were paid *by the country* a large sum of money for doing absolutely nothing.

Were the double diets introduced into the Justiciary Courts, much of this trouble, and inconvenience, and expense would be saved. Then why not? The difficulty, we understand, lies here. Before whom is the panel to be brought, at the first diet? It is said the sheriff, in the event of the panel pleading guilty, cannot pronounce the adequate punishment.

But we would venture to suggest that the panel might still be brought up to *plead* before the sheriff, and having done so, and the plea having been properly recorded, then the panel might remain over till the Justiciary Court meets, for punishment.

4. In the event of a jurymen becoming unwell, and unable to act during a trial, the trial should still proceed.

Our juries, in criminal cases, consist of fifteen jurymen. In a long trial, after the case has proceeded for a number of days, if a witness becomes unwell, the whole trial goes for nothing. It has all to begin again; or, if the panel is running letters, he may walk off untried from the bar. If, in Miss Smith's case, at the end of the sixth or eighth day, a single jurymen had taken unwell (and the wonder is that, in the circumstances, some one did not), the whole trial must have been begun afresh.

The remedy for such an abuse is not difficult. The case might still proceed with the fourteen, but still requiring a *majority*, or eight to convict. This is certainly not against the *panel*. If the jury should happen to divide, seven against seven, which is possible, then there would be no conviction. Suppose the missing man had been present, and would have voted for an acquittal, the panel is acquitted in either case—in one case, by seven against seven; in the other, by eight against seven. If he would have voted for a conviction, the panel gets the benefit. In the one case, he is acquitted by a division of seven against seven; in the other, convicted by eight to seven. We hope another session of Parliament may not be permitted to pass, without a remedy being applied to these abuses.

House of Lords Appeals.—The list of causes standing for hearing in the House of Lords, shows the usually large proportion of appeals from the Court of Session, compared with the number of cases from the Courts of England and Ireland. Altogether, the Scotch appeals are twenty-one in number, fully one-half of the entire list. Many of them involve important questions in the law of Scotland, which it is especially desirable should be settled as soon as possible. We fear, however, there is little hope of much progress being made this session. In point of fact, the most striking feature in this catalogue is the frightful arrear into which the appeal business of the House of Lords has for some years fallen. No less than eight cases, set down so long ago as 1856, are still standing unheard. We are entitled to expect much from the fresh energies of a new Chancellor; but that he should be able to sweep off, in one year, such arrears, is, we fear, too much to anticipate. The following is a list of the cases, with a note of the points involved in the more important:—

CAUSES STANDING FOR HEARING.

1. Anderson (pauper) *v.* Anderson or Gill *et al.*

Set down in Session 1856.

2. Borthwick *v.* Glassford *et al.*

First Division, Nov. 15, 1853, 16 D. 37. Action by the trustee on the sequestrated estate of Henry Glassford of Dougalston to set aside the Dougalston entail.

3. Belford *et al.* *v.* Morton.

4. Edmond *v.* Gordon and Another.

5. Morgan and Another *v.* Morris, *ex parte* as to certain respondents.

6. Geikie (or Young) *et al.* (paupers) *v.* Morris *et al.*, *ex parte* as to certain respondents.

These two appeals are from the Second Division of the Court, and are branches of the litigation which has for some years been pending regarding the Morgan succession.

7. *Tennant v. Morris et al.*

First Division, Jan. 31, 1856, 18 D. 382. Question as to the construction of a trust deed.

8. *Dixon and Another v. Dinmack, Thomson, and Fernestone, et al.*

First Division, Feb. 1, 1856, 18 D. 428. Question as to the validity, under statute 1696, c. 25, of iron scrip notes, in these terms:—"I will deliver," etc., "free on board, when required, to the party lodging this document with me." In this case, we may expect the doctrine laid down in the case of *Bovill v. Dixon*, by the House of Lords, to be repeated.

Set down in Session 1857.

9. *The Bartonshill Coal Co. et al. v. Stewart or M'Guire (Bill of Exceptions).*
10. *Stevenson and Co. et al. v. Thomson.*

First Division, 10th March 1855, 17 D. 739.

11. *Kippen and Another v. Darley et al.*

First Division, 3d July 1856, 18 D. 1137. Judgment of the whole Court as to the construction of a series of deeds affecting testator's succession.

Set down in Session commencing 30th April 1857.

12. *Hamilton v. Anderson et al.*

Second Division, 11th June 1856, 18 D. 1003. This case involves the important question, whether an action of damages is competent against a sheriff-substitute for a sentence of suspension pronounced by him, while acting in his judicial capacity, against a procurator in his court, in consequence of the conduct of the procurator in managing a depending cause, although malice and want of probable cause were alleged in general terms.

13. *Scottish North-Eastern Railway Co. v. Sir W. D. Stewart.*

Second Division, 8th Feb. 1856, 18 D. 540. This is a case of importance, not only from the magnitude of the claims made by the pursuer, but from their involving the construction and effect of agreements entered into between landholders and the promoters of a railway before the Act is obtained authorising its formation.

14. *Kyle et al. v. Jeffreys et al. (Bill of Exceptions).*

First Division, 30th May 1856, 18 D. 907. Question, whether a valid transfer of copyright must be in writing, attested by two witnesses.

15. *Bartonshill Coal Co. et al. v. Wark, ex parte.*

Second Division, 6th March 1856, 18 D. 773. Mining Case.

16. *Scots Mines Co. and Another v. Leadhills Mining Co. et al. (2d Appeal).*

17. Scots Mines Co. and Another v. Leadhills Mining Co. *et al.* (3d Appeal).

Second Division, 1856. The sole question in this complicated litigation is the meaning of an agreement as to certain water-courses.

18. Galbraith *et al.* v. The Edinburgh and Glasgow Bank, *et al.*, *ex parte* as to certain respondents.

Cases fully heard.

19. Edinburgh and Glasgow Railway Company v. the Provost of Linlithgow

20. Gammell *et al.* v. Her Majesty's Commissioners of Woods, etc., and the Lord-Advocate of Scotland.

In this case, the Second Division held, that salmon-fishings around the sea-coast of Scotland belong exclusively to, and form part of, the hereditary revenues of the Crown, so far as not made the subject of grants by charter or otherwise.

21. The Bartonshill Coal Company v. Clark or Reid, *et al.* (Bill of Exceptions).

The question here is, whether our law of reparation should receive the English rule, that a master is *not* liable for injury done to a workman, through the fault of a workman engaged in the same employment.

The Annus Deliberandi.—The only Scotch Bills which have been printed this session, are two prepared and brought in by Mr Dunlop—both happily on matters which will not be much affected either by the state of parties or change of government. The first abolishes the time-honoured privilege of the *Annus Deliberandi*, which many centuries ago came into Scotland, along with the Roman law. There are now very few estates, the value of which cannot be ascertained in a very few days; and still fewer persons who require a year to make up their mind, as to whether they are likely to gain or lose by a succession. But, even were this not so, the law is one which ought to disappear with the reason of it. By the 10 and 11 Vict., c. 47, heirs are relieved of the universal liability which formerly attached to them, on taking up a succession. Whether entering to their predecessors by special service, or by general service with a specification annexed, they are no longer liable for the predecessor's debts or deeds, beyond the value of the lands or heritages embraced in the service. But, while the heir is thus exposed to no possible prejudice by an immediate entry, all the inconveniences of the rule, to the public and creditors, still remain. Till the year has elapsed, no measures can be taken for attaching the succession, or for enforcing implement of the predecessor's obligations in reference to the same. Mr Dunlop has therefore brought in a short and sensible Bill, of two clauses only, to the following effect:—

That, "from and after the passing of this Act, it shall not be competent for any heir who may be charged to enter heir to his predecessor, or against

whom there may be raised an action of constitution with reference to any debt, deed, or obligation of his predecessor, or an adjudication or adjudication in implement with reference to any lands, heritages, or heritable rights of his predecessor, to propound the plea of *jus deliberandi*, or to suspend any such charge or stay any such action, adjudication, or adjudication in implement by such plea; and all charges, actions, adjudications, adjudications in implement, decrees, or other proceedings whatsoever against such heir, or with reference to the lands, heritages, or heritable rights of his predecessor, which heretofore would have been competent and valid when given, raised, or obtained after the lapse of a year and day from the date of the predecessor's death, known as the *Annus deliberandi*, shall be equally competent and valid when given, raised, or obtained before the lapse of such period."

The Valuation Bill.—Mr Dunlop's other Bill is to remedy an oversight in the Valuation Act (17 and 18 Vict., c. 91), passed in the year 1854. In section 43, interpreting "lands and heritages" *inter alia*, shootings and deer forests were declared to be assessable only where such shootings, etc., are actually let—a limitation which operated most unjustly in favour of the very men by whom taxes should be paid—those large holders of mountain ranges and wild moorland, who were rich enough to keep them in their own hands for their own purposes. Again, while in fairness every description of property should be placed at its true annual value in the Assessment Roll, the *dominium directum*—in some cases the most valuable of all forms of territorial wealth—was entirely overlooked. Now, no doubt, in many cases feu duties are not assessable. But while, by the Act of 1854, insertion of property in the Valuation Rolls, to be made up as there directed, does not render it liable to any tax to which it is not subject by law, its exclusion removes the only means by which an assessment is to be ascertained and imposed; and this operates as an exemption from taxes to which otherwise it would be liable. To remedy these evils, this Bill has been brought forward. It simply repeals the section of the Act of 1854 defining lands and heritages, and gives the expression a wider and more comprehensive definition; retaining, of course, the provision of the former Act, "that nothing should exempt from, or render liable to assessment, any person or property not previously exempt from or liable to assessment." The most important change is, (1) the removal of the qualification, that shootings to be capable of valuation should be actually under lease; and (2), the insertion of feu duties along with the other descriptions of real property. The Bill, as far as it goes, appears to be a fair and equitable amendment on the former law. Its provisions are:—

I. So much of the Forty-second Section of the said recited Act as prescribes the meaning and interpretation of the words "Lands and Heritages," as in the said recited Act used, is hereby repealed.

II. The words "Lands and Heritages," in the said recited Act used, shall in the said Act extend to and include all lands, houses, shootings, fishings, feu duties, ferries, piers, harbours, quays, wharves, docks, canals, railways, mines, minerals, quarries, coalworks, waterworks, brickworks, ironworks,

gasworks, factories, and all buildings and pertinents thereof, and all machinery fixed and attached to any lands and heritages.

III. This Act and the said recited Act shall be read as one Act."

Extracts from the Records.—A point of some importance was mooted before Lord Ardmillan lately, in an action of reduction as to the validity of extracts, which it is a pity was not authoritatively settled one way or another. The defender lodged in process an extract of a last will and testament, and of a codicil which had been written on a separate piece of paper, and moved that the production should be held as satisfied. The pursuer objected to the validity of the extract of the codicil, that it contained no clause of registration, and was improperly recorded. The assistant-keeper appeared at the bar, and explained that the practice was, when a separate paper of that kind, bearing to be of the nature of a codicil, was handed in along with a will containing a clause of registration, they were both recorded, and one extract given. Lord Ardmillan stated his intention to report the point to the Inner House, when the defender agreed to return the extract to the record, and borrow up both documents, with the view of lodging them in process. He was entitled to do this, as the in-giver of the writs, within six months; and the matter was thus arranged, without the necessity of judicial determination. If extracts are given out, which the Court may hold not to be proper extracts, and these are lodged in actions of reduction to satisfy production, it would be rather a serious thing for the pursuers afterwards to discover that they have only reduced a copy of the document complained of. The matter is worthy the attention of agents, and of the keeper of the records, for the purpose of having it put upon a proper basis.

Attempt to commit Theft no crime.—In the year 1838, the Court of Justiciary, after full argument, solemnly decided that it has the power of declaring an act never punished before to be a crime punishable at common law.—(Greenhuff, 2 Swint. 237.) The particular matter then under inquiry was the suppression of a gambling house. A few days ago, the Court refused to exercise the same power to suppress an attempt to commit theft; a lesser deviation, surely, than the other from the beaten track of criminal procedure. Is not this to strain at a gnat after swallowing a camel?

The case to which we allude, is that of Walter Duthie Ure, decided on 15th ult. The panel was alternately accused of assault with intent to rob, and of attempt to commit theft. The narrative applicable to the latter alternative was as follows:—

"Or otherwise, time and place above libelled, you, the said Walter Duthie Ure, did wickedly and feloniously attempt to commit theft, by laying hold of the said leather case, containing the said brooch, which the said Félicité M'Candlish was then carrying in her hand, and endeavouring or attempting to snatch or take the same from her."

The Court refused to affirm the relevancy of this charge, or to recognise an attempt to commit theft as a *nomen juris*.

We do not understand this decision to be a reversal of Greenhuff's case, or an abdication of the power *nova delicta puniendi*. It is not even, as we read the opinions delivered, a refusal to punish an attempt to steal, but only a refusal to punish it *eo nomine*. In effect, the Court say they are quite willing to punish the offence, provided it be called by another name. Use a descriptive major in your indictment; say, for example,—“Albeit, by the laws of this and of every other well-governed realm, the putting of one's hand into the pockets of any of the lieges, with intent to steal, is a crime,” etc.; enumerate in an abstract form in the major, the very particulars which you afterwards narrate in a concrete form in the minor; and you may possibly make a good indictment. We must humbly confess ourselves unable to see how this form will prevent the very difficulties which the judges professed their anxiety to avoid, in distinguishing between an incomplete act of theft which the law will punish, and an incomplete act of theft of which the law will take no cognizance.

The judges say, in substance: We have gone on very well without this new charge hitherto; we can therefore henceforth do very well without it. No doubt, such a charge is a novelty in an indictment brought before the Supreme Court; but a charge of attempting to pick pockets, without any statutory sanction for this form of accusation, has long been common in our Police Courts; and its competency was understood to be settled by the case of *Etch and Golf v. Burnett*, March 15, 1849.—(Shaw's Just. Rep., 201.) Such a view is scarcely maintainable now. If you cannot charge an attempt to steal, you cannot charge an attempt to pick pockets, unless it be contended that picking pockets is one thing, and that stealing is another. The decision in *Ure's* case necessarily unsettles the practice of the Inferior Criminal Courts throughout the country, until parliamentary sanction for it shall have been obtained.

Postscript.—*The New Ministry.*—The profession will observe, with satisfaction, that there is at length a prospect of seeing the Dean of Faculty in Parliament. As Lord Advocate, and Member for Stamford, we feel satisfied that he will confirm the good impression which Mr Moncrieff has produced in favour of his order. The opportunity of doing so may be brief, but the measures required by the country are now so little tinged with party politics, that, looking at the matter from a purely professional point of view, it seems to us to be of very little importance, so far as the administration of the law is concerned, who is out, and who is in. We hope Mr Moncrieff will go on with the Bills he has in preparation, especially the one regarding Procedure in Consistorial Causes. With respect to the other new law officers of the Crown, various names are mentioned, which, till the appointments are definitely made, it is needless to repeat.

New Books.

A Handy Book on Property Law. In a Series of Letters. By
Lord ST LEONARDS. Blackwoods.

WHEN an ex-Chancellor selects so dry and complicated a subject as the English law of real property, for a work, which he is bold enough to think may not only impart knowledge to the million, but may "perchance beguile a few hours in a railway carriage," the undertaking becomes one of the most interesting subjects of professional curiosity. To the legal mind, the idea has all the force of striking originality. A work on law, by so illustrious an authority, couched in homely and familiar phraseology—rigidly eschewing technical terms—with the statutes uncited, and the cases not "brought down"—not only a singularly lucid exposition of the leading legal principles, but, in many respects, a most amusing volume!—is truly, to the lawyer, a literary wonder. We are well aware that, as a general rule, the profession has a great horror of these cheap popular manuals—the careless production of an ignorant compiler—by which "every man is to be made his own lawyer." Perhaps the feeling should be all the other way; for it is to the crude conceptions of their rights and wrongs, which non-professional persons obtain from such blind guides, that a large amount of useless litigation is every year to be attributed. A little knowledge of law is indeed an exceedingly dangerous thing. But this little book is of a totally different stamp, and with a very different aim. Every person of ordinary education should have some knowledge of legal principle among his other general acquirements—not that he may be thereby enabled to do the proper work of his solicitor, but in order that he may better appreciate the necessity of professional guidance when occasion truly requires it. There can be no question that the gross ignorance, even on the part of well educated men, regarding law, or rather, the prevalence of erroneous views on the subject, daily gives rise to difficulties, which a little wholesome advice in time would have certainly prevented. "It is unquestionably a matter of profound regret," says Lord St Leonards, that so large a proportion of contracts respecting estates, should lead to litigation. It is equally to be regretted, that however desirous the man of property may be to understand the effect of his daily contracts, there is no source to which he can apply for the desired information." So the author of "Venders and Purchasers," at the close of a long and successful career, addresses himself to the million, on the same subject which formed the material of his first Essay in starting in life. "I have" (he says), "in my youth, and in my manhood, written much for the learned in the law; why should not I, at the close of my career, write somewhat for the unlearned?" His great work on "Venders

d Purchasers," which, he says, in the preface to the last edition, as the foundation of his first success in life, was written in the year 1803, at the age of twenty-two, with the aid of the library of Lincoln's Inn, for "his own shelves were then but scantily furnished." When announced, the universal opinion was, it would be a failure—the subjects being thought too multifarious for one treatise. Perhaps, however, no book was ever more thoroughly successful. It now stands, in its fourteenth edition, a monument of talent and industry—swelled to its present vast proportions by the additions made to each edition, the fruit of half a century's labour and research. If, therefore, there is one man living who can be said to understand such a complex subject as the law of real property, it is Lord St Leonards; and to this circumstance may be attributed much of the charm of this very "handy" little book. The author discourses with all the ease and freedom of one thoroughly familiar with his subject. Obviously it has been thrown off without any ransacking for cases and authorities. Of these, the author's mind is necessarily largely stored, but their citation would only interfere with a popular exposition of the grounds on which they rest. It is, in short, a playful specimen of the gigantic strength of a master in the science—written, *currente calamo*, in an easy familiar style, never for one moment marred by any appearance of labour or effort.

Necessarily the work is very rudimentary; but, on that account, will be not the less serviceable to those for whom it is designed. Lord St Leonards addresses them on those points which are of the most common occurrence in everyday business. "It would have been idle in me" (he says) "to have furnished you with nice disquisitions on abstruse points of law. I have felt no anxiety, in any case, to point out to you how you may evade or break in on any rule. I have avoided the lanes and byeways, and endeavoured to keep you on the public high road." Consistently with this purpose, the reader is generally informed of those matters which should be attended to in selling, buying, mortgaging, leasing, settling and devising, an estate. The work, we need scarcely say, being thus rudimentary in its character, will be of peculiar service to a Scotch lawyer, in initiating him into the peculiarities of the English system of land rights, and enabling him to contrast them with the far more commendable features of our own. With this view, we shall take a rapid run through its pages.

Beginning with the points to be observed in the sale and purchase of an estate, the author devotes a chapter to the exposition of the anomalous distinction between law and equity, which is to be found in no other country save England. The difference consists in this, that, while equity will give the thing itself by ordering the agreement to be specifically implemented, law can only award damages for non-performance; while the latter decides according to the strict letter of the contract, equity affords relief according to the substan-

tial intention of the parties. Thus two distinct and independent systems of jurisprudence have grown up, side by side, recognising different classes of rights, and administering different remedies. After pointing out a few of the absurd consequences which flow from this iniquitous divorce, the author proceeds to show the effect of a contract for the sale of land, as respects the party's succession—a subject on which landed gentlemen, with large families, cannot keep too prominently in view. From the time of the agreement to sell, the estate in equity belongs to the purchaser and the price to the vendor. From this, these important consequences follow:—If already devised by the vendor it will not pass, because the devise becomes trustee for the buyer; or, if the will directs that it be sold, and the price paid to a legatee, the subsequent sale deprives him of both the estate and purchase money. So, if the lands are let, with an option to the tenant to purchase before the expiry of a term, and, meantime the owner dies, leaving all his personalty to the younger children, the after purchase by the tenant before the termination of the period will make the price fall into personalty, and the heir will get nothing. All such cases should be kept in view by a party making his will. Of the distressing consequences which are continually happening from want of attention in this particular, Lord St Leonards gives this example:—

“A most vexatious case once happened: A younger brother agreed to purchase an estate from his elder brother; the conveyance was accordingly executed, but the money was not paid. The younger brother then made his will, giving his property to his brother, subject to legacies, and made him executor. The will, however, was not executed so as to pass the estate. The younger brother died, and the elder brother took the estate as his heir, and also paid himself the purchase-money out of the personal property; by which he disappointed the legatees, who lost their legacies, whilst he got both the estate and the purchase-money for it.”

The three following letters explain the general duties incumbent on buyer and seller. Regarding misrepresentation and concealment, the current of decision both in England and Scotland has been pretty nearly similar. The duty of disclosure does not extend to such defects as the seller knew or ought to have known; because the law refuses to protect those who are in circumstances to protect themselves. It only interferes against the seller, where he prevents the purchaser from ascertaining the defect—*e.g.*, if he plasters up a wall to conceal its imperfections, the purchaser is relieved from the contract. If, however, the defect is latent in the estate or title, the seller becomes bound to declare it; but this protection does not extend to such defects, as a right of way over the property—faults in a mine—an erroneous inference as to situation, because, “you, as a provident man, ought not to trust to the description of the vendor or his agents, but to examine and ascertain the quality of the estate yourself, and you should have the title to it inspected by counsel.” On the question whether a vendor is bound

to disclose a known latent defect, where a sale is with all faults, Lord St Leonards indicates an opinion that the vendor is so bound ; but he adds, "upon this point, however, the authorities are divided." This point has been very largely considered in cases relating to the sale of ships "with all faults." The doctrine thence deducible is, that a sale with all faults, though an emphatic exclusion of all warranty, is no protection against fraud by the vendor ; and in this case it is fraud to prevent the purchaser making the discovery. It was so laid down in a leading case, *Baglehole v. Walters*, 3 Camp. 154, where it was held that, where a ship was sold "with all faults," the seller is not liable for latent defects which he knew of, but did not disclose at the time of the sale, unless he used some artifice to conceal them from the purchaser. But the cases as to personal and real estate, differ considerably. The following is an admirable statement of this rather difficult branch :—

"Thus I have told you what truths you must disclose. I shall now tell you what falsehoods you may utter in regard to your estate. In the first place, you may falsely praise, or, as it is vulgarly termed, puff your property ; for our law, following the civil law, holds that a purchaser ought not to rely upon vague expressions uttered by a vendor at random in praise of his property. And it has even been decided, that no relief lies against a vendor for having affirmed, contrarily to truth, that a person bid a particular sum for the estate, although the buyer was thereby induced to purchase it, and was deceived in the value. So you may affirm the estate to be of any value which you choose to name, for it is deemed a purchaser's own folly to credit a bare assertion like this. Besides, value consists in judgment and estimation, in which many men differ.

"Again, you may, with impunity, describe your land as uncommonly rich water meadow, although it is imperfectly watered. In selling an advowson you may, in like manner, state that an avoidance of the living is likely to occur soon. So where a renewable interest is sold, and a fine on renewal is payable, the seller may state it to be a small fine, although it is of considerable amount. Such statements are cautions to purchasers to inquire. So mere puff, as that a house is fit for a respectable family, is entitled to no weight ; but you must not, in answer to inquiries, assert, contrary to the fact, that your house is not damp. You are not bound to inform the purchaser, that upon the tenant's complaint, the full amount of rent, has not been paid ; nor are you bound to tell him what offers have previously been made to you ; for a concealment, to be material, must be of something that the party concealing was bound to state. But you must disclose any right of sporting over the estate, or any right of common over it, or any right to dig for mines upon it, or the liability to repair the chancel of a church, or the like. And you may not refer a purchaser to an agent who is ignorant of circumstances affecting the property of which you yourself are aware. If your agent should be guilty of fraudulent representation, or a fraudulent concealment, you would be liable.

"If you should affirm that the estate was valued, by persons of judgment, at a greater price than it actually was, and the purchaser act upon such misrepresentation, you could not force the contract in equity. Nor can you with impunity misstate the quantum of rent paid for the estate, because that is a circumstance within your own knowledge : the purchaser may have no other source of information ; or your tenants, if he were to apply to them, might combine with you, and so misinform and cheat him. And the purchaser will have a remedy against you for the fraud, although he did not depend upon your statement, but inquired further."

Persons interested in land will find much sensible advice as to

the mode of carrying through a sale, the conduct of the negotiation, and the rules of an auction-room. Amongst other little matters we find the following note touching Fire Insurance:—

“A word of advice about your Fire Insurances. Very few policies against fire are so framed as to render the company legally liable. Generally the property is inaccurately described with reference to the conditions under which you insure. They are framed by the company, who probably are not unwilling to have a legal defence against any claim, as they intend to pay what they deem a just claim, without taking advantage of any technical objection, and to make use of their defence only against what they may believe to be a fraud, although they may not be able to prove it. But do not rely upon the moral feelings of the directors. Ascertain that your house falls strictly within the conditions. Even having the surveyor of the company to look over your house before the insurance, will not save you, unless your policy is correct. To illustrate this, I will tell you what happened to myself. I have two houses in different parts of the country, both of which open from a drawing-room by a glass-door into a conservatory. The one I had insured, for a good many years, from the time I built it; the other I had insured, for a few years, from the time I bought it, in the same office, when a partial fire broke out in the latter, and I was then told by the office—a highly respectable one—that my policy was void, as the opening to the conservatory rendered it hazardous, and if so, of course both policies had been void from their commencement. I was prepared to try the question, and ultimately the objection was withdrawn, and my loss was paid for. Upon renewing my policy, with some alterations, I actually had some difficulty with the clerk of the company to induce, or rather to force him, to add to the description the fact, that the drawing-rooms opened through glass-doors into conservatories. In treating, at a later period, for a policy with another company, I required them to send their surveyor to look at the house and the stoves; and everything to which objection could be taken were shown to him. The company then prepared the policy, and made it subject to the report made to them by their surveyor, referring to it by date. This report I never saw, and the objectionable stoves, etc., were not noticed. Of course I had the reference to the report struck out, and the policy made correct, but not without some personal trouble. I state these circumstances, to show you how careful you should be. I advise you to look at once at your existing policy. If you have added an Arnot's stove, or made any other important change in your mode of heating your house since your policy, or you had at the time of your policy any peculiar stove, etc., not noticed in the policy, you should call upon the company to admit the validity of your policy, by an endorsement on it.”

Not confining himself to the law as it exists, Lord St Leonards occasionally favours us with his opinion regarding the policy of some of the proposals for its amendment which have recently been under discussion. On such occasions, we were prepared to find his views considerably tinged with that honest Conservatism which he has all his life maintained, but we were scarcely prepared for the exhibition of those narrow prejudices which seem an inherent characteristic of the English legal mind. Speaking of title, he attacks in no measured terms, the scheme for the establishment of a general registry throughout England, similar to the system which, for more than two centuries, has been found in this country to be of the highest practical utility. Our experience is, however, never once adverted to, and the landowners of England are warned against certain hypothetical perils, to which it is a sufficient answer to say that, under

the Scotch system of registration, they have never once occurred. His settled conviction is, that a general registry is not advisable, because—(1.) It wantonly exposes the concerns of all mankind. We are not aware that this in practice has ever been found to be any serious objection; and as the English public here long had their wills made public documents, without inconvenience, there can be no reason why the same publicity should not be extended to the conveyances of property. The truth is, from the trouble of consulting a public register, it is rarely resorted to from mere motives of curiosity. (2.) It is said, questions of priority of registered deeds often lead to litigation. Priority is no doubt necessary to the almost mathematical certainty which, by our system, is secured; but the matter of fact is easily ascertained by consulting the minute-book, and if registration was made a condition of validity, it would just be as carefully attended to as any of the other formalities essential to the deed. Then (3.) He says that, “if registered offices were once established throughout the kingdom, they never could be got rid of without paying a heavy compensation for the loss to the officers in possession—an argument which every Radical might use for the abolition of every institution we have—the office of Lord Chancellor included. These are, however, minor considerations compared to the terrible consequences that would ensue were every conveyance made void for want of registration in the time prescribed. “The land would revert to the seller, and he would have back the estate, and also keep the price paid to him. Would this be endured?” These consequences already follow from any inattention by the solicitor to the existing rules of law in the preparation of the deed; and if the public can endure that the deed should be void in the one case, why not in the other. But not to dwell further on this subject, we find Lord St Leonards answering himself—

“It is objected that these purposes are effected by a complicated and an expensive machinery; but whoever complained of the complex movements in a well-finished watch? We admire the connection of its parts depending on each other, and all necessary to form the combination which produces the desired results. Why then should we complain of a well-digested settlement?”

We shall only add, that if any system of registration is objectionable, the shifts and expedients to which, for want of its protection, a purchaser is at present compelled to have recourse, are surely still more so. In order to assure himself as to the title, it is recommended that this course be followed:—

“If you suspect that any person has a claim on an estate which you have contracted to buy, you should, before proper witnesses, inquire the fact of him, at the same time stating that you intend to purchase the estate; and if the person of whom the inquiry is made have an incumbrance on the estate, and deny it, equity would not afterwards permit him to enforce his demand against you. The witnesses in this case should take a note of what passes, because a witness may refresh his memory by looking at any paper, if he can afterwards swear to the facts from his own memory.”

Lord St Leonards next subject is the rights of Husband and Wife. The opinion is now becoming general that some restriction on the old doctrine on this subject in favour of the wife, is absolutely required by the interests of justice and sound policy. As will be seen from the following paragraph, some tentative efforts in this direction have already been made.

"I must yet give you some information about the rights of property in married women. Both real and personal estate may be settled upon a woman for her separate use, so as wholly to exclude any right of the husband, and such a provision generally enables the woman, although married, to dispose of it by alienation; but this may be, and frequently is, guarded against by an express clause against anticipation, which, during the marriage, effectually prevents any alienation of the fund. A wife having a *separate* estate cannot be compelled to contribute to the family wants, or to maintain her children. Although a married woman with her husband can convey or transfer all her interests in real property, yet neither she nor her husband can deprive her of any interest provided for her out of mere personal estate—funded property for example—to take effect on her husband's death. So that if you provide a portion for your daughter on her marriage, and settle it on the husband for life, and then on your daughter for life, and then to the children, you may feel assured that your daughter will benefit by your bounty on her husband's death. Many attempts have been made in Parliament to take away this security, and to enable the husband and wife to sell her life interest, and so strip the woman of the provision made for her. These attempts have hitherto been successfully resisted, but a partial measure has just been carried, providing that married women may, by deed acknowledged in manner *required by the Act*, with their husband's concurrence, dispose of every future or reversionary interest to which the woman, or her husband in her right, shall be entitled in any personal estate *under any instrument made after the 31st December 1857*, and relinquish or release any power she has, or her right or equity to a settlement out of any personal estate; but this power does not extend to any reversionary interest which she is restricted from alienating, nor does it enable her to dispose of any interest in personal estate *settled upon her by any settlement, or agreement for a settlement made on the occasion of her marriage*.

"There is reason to fear that the next step will be an attempt to repeal the exception, and make the power of alienation extend to all interests. Such a power would lead to constant disputes between husband and wife. Upon any pressure, the husband would call upon her to sell her reversion to assist him, and creditors knowing of the settlement and of the power of alienation, would refuse to show any indulgence unless the wife pledged her reversion for her husband's debts. Many a woman, anxiously provided for by an affectionate father, would be left penniless at her husband's death, when probably her father was no longer alive to assist her. The Act must give great satisfaction to purchasers of reversions, and particularly to companies expressly formed for the purchase of reversionary interests. In making any provision for your daughter by your will, you can guard against the operation of the Act by making the provision inalienable. Of course the observation applies only to annuities, or interests for life, or interests in reversion.

There are some very valuable instructions given for the preparation of a marriage settlement. Illustrative of the cases in which relief against fraud is obtainable, we have the following amusing instance:—

"Equity will, in some cases, relieve a party on the ground of fraud, although there is not a valid agreement. A man of the name of Halfpenny, upon a treaty for the marriage of his daughter, signed a writing, comprising the terms of the

agreement; and afterwards designing to elude the force of it, and get loose from his agreement, ordered his daughter to put on a good humour, and get the intended husband to deliver up the writing, and then to marry him, which she accordingly did; and Halfpenny stood at the corner of a street to see them go by to be married, and afterwards refused to perform the agreement. He was, however, compelled by equity to do so; although while the case was before the Court he walked backwards and forwards, calling out to the judge *to remember the statute*, which he humorously said, *I do, I do*; and he held the case to be out of the statute on the ground of fraud."

In the preparation of his will, the reader is well cautioned against attempting to dispense, in so important a proceeding, with the assistance of a professional adviser. The soundness of this advice is confirmed by all professional experience. Many a valuable estate has been squandered in the attempt to ascertain the testator's intentions, from the inartificial mode in which they are expressed. Lord St Leonards says:—

"I would particularly warn you against the use of printed forms, which have misled many men. They are as dangerous as the country schoolmaster or the vestry clerk. It is quite shocking to reflect upon the litigation which has been occasioned by men making their own wills, or employing incompetent persons to do so. To save a few guineas in their lifetime, men leave behind them a will which it may cost hundreds of pounds to have expounded by the Courts before the various claimants will desist from litigation. Looking at this as a simple money transaction, lawyers might well be in despair if every man's will were prepared by a competent person. To put off making your will until the hand of death is upon you, evinces either cowardice, or a shameful neglect of your temporal concerns. . . . It were useless for me to attempt to show you how to make a strict settlement of your property, and therefore I will not try. I could, without difficulty, run over the names of many judges and lawyers of note, whose wills made by themselves have been set aside, or construed so as to defeat every intention which they ever had. It is not even a profound knowledge of law which will capacitate a man to make his own will, unless he has been in the habit of making the wills of others. Besides, notwithstanding that fees are purely honorary, yet it is almost proverbial that a lawyer never does anything well for which he is not fee'd. Lord Mansfield told a story of himself, that feeling this influence, he once, when about to attend to some professional business of his own, took several guineas out of his purse, and put them into his waistcoat pocket, as a fee for his labour."

If space permitted, we might have made some further extracts in explanation of Lord St Leonard's views touching recent legislation on the subjects of Trusts,—more particularly his own measures for the amendment of that interesting branch of the law. We hope, however, we have said enough to show the very remarkable success which has attended the noble Lord, in popularising a department of knowledge so intricate and technical. The preparation of a popular book on the law is the most difficult of all tasks. It is either superficial or unintelligible; but Lord St Leonard's, by confining himself to the points of most frequent occurrence, by constantly using the most familiar phraseology, and never ascending above the plainest and most intelligible illustrations, has, in this little volume, achieved a success which may be safely pronounced to be the first of its kind.

Correspondence.

WHAT IS LEGAL INTEREST?

THIS question, discussed in an article in your Journal for January last, is one which most practitioners have found it necessary, at some time or other, since 1854, to put to themselves, or, it may be, to some of their brethren who were thought to be wiser than themselves. It can hardly be supposed that the Legislature, when abolishing the Usury Laws, and, along with them, the practical rule which had sprung up for determining the rate of interest exigible where no particular rate was fixed by express stipulation, should have overlooked the obvious necessity for laying down some rule to guide our courts of justice in cases of that kind. That the Legislature have, since the passing of the Act, 17 and 18 Vict., c. 90, understood the phrase, "legal interest," to have a meaning, is to be inferred from their using it in the recent Bankruptcy Act, to which reference is made in the article in question. Was not the third section of the Abolition Act, the structure of which is severely, though perhaps not too severely, criticised in your Journal, intended to supply the rule wanted? Take the following paraphrase of it:—"In all cases, that is to say, not individual transactions, but transactions of a class or kind, in which interest is now payable by any sort of contract (express or implied), but where no particular rate has been specified, and in all cases in which, upon any debt or sum of money, interest is now payable *ex lege*, or otherwise than by paction or agreement, the same rate of interest shall be recoverable as if this Act had not been passed." In such cases, five per cent. would have been the rate exigible, generally, before the abolition of the Usury Laws. Did the statute not mean to say, in its third section, that the same rule should remain in force after the passing of the Abolition Act? If the special circumstances of any individual case would have made "legal interest" mean, for it, a lower rate formerly, of course that lower rate must be legal interest still, upon the recurrence of a similar case in the future.

The possible constructions of the third section of the Abolition Act appear to be three. It is either, *first*, a clumsy repetition of the second section—a thing not to be lightly admitted; or, *secondly*, it re-enacts the very laws which it was the professed object of the statute to repeal; or, *thirdly*, it has the meaning which has been attempted to be put upon it by the above paraphrase.—I am, etc.,

ONE OF THE PUZZLED.

February, 1858.

[We had in view the meaning suggested by our correspondent in his paraphrase of the third section of the Usury Abolition Act. It is the same meaning which is also suggested in the rubric of that section. We found ourselves unable, however, to import that meaning into the statute itself, without supplying or altering its present language to an extent which we did not feel justified in doing. The words "any contract," and "any debt or sum of money," appear to us to be used in the concrete, not in the abstract. To enable us to take them as used in the latter signification, the entire construction of the sentence in which they occur would require to be changed. And even supposing the terms in question to be so used, the enactment would still involve the contradiction that any contract, express or implied, for payment of "current" interest, would, although actual current interest might be six or seven per cent. or upwards, have to be interpreted as a contract for interest not exceeding five per cent. Again, is the operation of the law, in such case, to be

only on the one side? If the interest be diminished to five per cent., when the current rate exceeds that amount, is there to be no compensating operation when the current rate falls below five? But we did not undertake to interpret the section in question of the statute. We could not. Neither do we now venture to pronounce conclusively on the points put by our correspondent, further than that, in a contract—say, for “legal interest”—we presume effect would be given to it, according to the meaning of the parties. Our object was to draw attention to the difficulties in the application of the statute, to some extent, on the points above adverted to, and to the difficulties which may arise from the want of any authoritative regulation with regard to the amount of interest to be awarded *nomine damni*, and to be made payable *de futuro* on judgment debts, with a view to these difficulties being obviated in the only way they can be obviated, namely, by legislative enactment.—*Ed. J. J.*]

THE ABOLITION OF THE USURY LAWS—WHAT IS LEGAL INTEREST?

(To the Editor of the Journal of Jurisprudence.)

SIR,—In the last number of your Journal, I observe an article under the above title, containing a sharp attack on the Act of 1854, by which all laws against usury then existing were repealed. I plead the importance of the subject as my apology for troubling you with a few words on the other side.

The principal clause of the Act provides, that “all existing laws against usury shall be repealed,” without adding “from and after the date of the passing of this Act.” It has, I believe, been usual in such enactments to leave out these obviously implied words, ever since the statute of 1850 was passed “for shortening the language used in Acts of Parliament.” Their omission certainly does not render the sense doubtful. The purpose of the Act is quite clear. In any contract relating to the interest of money, parties may stipulate any rate they please; and their stipulation will receive legal effect. This purpose, your contributor admits, has been accomplished. But he adds: “In regard to interest to be exacted or awarded in the absence of express contract, and indeed in regard to every contract, express or implied, made since the passing of the Act, and to be hereafter made, in which the precise rate of interest shall not be numerically defined, we apprehend that this Act has completely unsettled the grounds of practice existing at the period of its passing, and has not established any distinct or clear regulation for the future, but very much the contrary.”

I shall only observe, with reference to these concluding words, that if the legislator had made any such regulation as is here pointed at, he would have been setting up with the one hand the very thing he had put down with the other; his object being precisely this, to put an end to all statutory regulation on the subject, leaving the matter to stand upon the express stipulations of the parties, or, in the absence of such stipulations, to be disposed of by the courts of law, in accordance with their rules of law or equity, as applied to the circumstances of each case.

In the language of our law courts, legal interest means interest at 5 per cent. A creditor who obtains decree for £100 against his debtor, with legal interest from the date when the same fell due till payment, is entitled to recover 5 per cent. as the penalty of delay. That was the meaning of such a decree before the statute, and that is its meaning now. The third section of the Act expressly provides, that “where, upon any debt or sum of money, interest is now payable by any rule of law, the same rate of interest shall be recoverable as if this Act had not been passed.” Can anything be clearer than this?

If what is usually called the legal rate of interest had been fixed by an express statutory provision, I could have understood your contributor's objection. That statutory provision must have fallen under the clause of repeal, unless expressly excepted from its operation. But, as your contributor himself observes, there is no statute which "enacts that 5 per cent. shall be held to be legal interest." That matter was not matter of statutory regulation before: it is not matter of statutory regulation now.

Your contributor follows up his citation of the third section of the statute by these observations:—"An expression new to the law of Scotland is used here. We have no such phrase as 'Rule of Law.' We have Acts of the Legislature, and Acts of Sederunt of the Court, and we have the Decisions of the Court, and the Practice of the Profession, and the Custom of the Country; but we have no such term as 'Rule of Law' in our nomenclature." Has our law no rules? Have we not the thing; and if we have the thing, is the phrase a wrong or inadequate expression of the thing? In a previous part of his article, your contributor intimates a desire not to be hypercritical. Surely the wish has proved a poor security for its own fulfilment.

If anything be clear it is this, that the legal rate of interest, in the absence of express stipulation or decision, is expressly reserved from the operation of the statute. What that rate was before, it remains still.

Your contributor says:—"When, upon the persuasion of Turgot, the usury laws of France were abolished by the National Convention in 1793, the effects were found so disastrous and fatal, that twenty-three days afterwards they were re-enacted." Your contributor might as well have said that the latter step was taken on the advice of Lord Bacon, as that the former was taken on the persuasion of Turgot. The eminent economist and minister of Lewis XVI. died in 1781.

I do not propose to follow your contributor in his argument against the repeal of the usury laws. On that subject I shall but refer him to the opinions of two eminent authorities, the one dead, the other yet living. Let him read a little book by Jeremy Bentham, entitled "Defence of Usury," and written in 1787. Let him give due weight to the following pithy sentences of Archbishop Whately on the usual plea for usury laws, the protection of the weak and improvident against extortion:—

"No doubt, advantage is often taken of a man's extreme necessity to demand high interest, and exact payment with rigour. But it is equally true that advantage is taken, in some crowded town, of a man's extreme need of a night's lodging. Again, it is but too well known that where there is an excessive competition for *land*, as almost the sole mode of obtaining a subsistence, it is likely that an exorbitant rent will be asked, and that this will be asked with unbending severity. But who would thereupon propose that the letting of land should be prohibited, or that a maximum rent should be fixed by law? For legislative interposition in dealings between man and man, except for the prevention of fraud, generally increases the evil it seeks to remedy."

In France, interest is still regulated by law, and usury is still a crime liable to punishment. A proposal has recently been talked of for the repeal of these laws (passed in 1807). The expediency of such a repeal is one of the few public questions of which the Government permits the discussion in the newspapers. Not long since, I observed in the *Journal des Débats* a citation from Turgot, on the question of fixing a legal rate of interest. I hope the passage will "persuade" your contributor:—

"The only plausible ground alleged to justify the practice of fixing the rate of interest by a law is, that judges may have a fixed instead of an arbitrary rule of decision, when they have to deal with a judicial claim of interest, in consequence of a delay of payment, or when they have to prescribe to a guardian the rate of interest upon which he is to invest the funds of his ward. But all this may be done without a law fixing an irrevocable and universal rate of interest. Although the rate cannot but vary in different cases, there is a rate which varies little, at least during a limited period; I mean the interest of

money, of which the investment is all but perfectly safe, such as money lent out on first-rate heritable security, or to traders whose wealth, prudence, and honour are matter of notoriety. To this rate of interest judges ought to conform themselves; and to that rate, accordingly, they do conform themselves, when disposing of a judicial demand for interest, or giving any requisite authority to a guardian in the management of his pupil's estate. Since this rate of interest undergoes little change, and is the same for everybody, no law is required to fix it: it is enough for the Court to make a public decree, renewable from year to year."

There is nothing, now that all usury laws are repealed, to prevent the Court of Session from doing likewise, by Act of Sederunt, if they shall see fit. But no harm will be done for the present by their leaving matters as they are.—I am, etc.

F. H.

REGISTRATION.

(To the Editor of the Journal of Jurisprudence.)

SIR,—I am glad to see the attention of the profession has of late been turned to the state of the Land Registers, with a view to giving increased facilities for searches, and diminishing the expense. This is a subject of great importance to the community, particularly as regards the transfer of property of small value, where, owing to the disproportional expense of searches, they require frequently to be dispensed with altogether, or if insisted on, form a grievous addition to the cost.

Through the medium of your Journal, I beg to offer the following suggestion, which, I think, if adopted, would be found of considerable practical utility.

When a deed is given in to the register of sasines to be recorded, it should in every case be accompanied by a full description of the lands on a sheet of vellum, which should be certified as correct by the keeper of the register. After the deed has been recorded, the keeper of the record should be required to make a short entry on this sheet of the nature of the deed in the same way as is done at present in the minute-book, or in a certificate of search, and to sign the entry. A fee of 7s. 6d. was lately given to the keepers of the register for certifying that a deed is recorded; and as this is a new fee for doing what was done before without it, I think they might be reasonably asked to make the entry above referred to without additional expense.

Whenever any subsequent deed is recorded relating to the same property, the sheet should accompany it for the purpose of getting a certificate of its registry engrossed, and the deed should be held null, in so far as regards third parties, unless such certificate be entered in that sheet.

It will be seen that wherever a feu-right is granted subsequent to this course being adopted, the sheet referred to will form a complete search of incumbrances, in so far as affects the subjects, obtained without trouble or expense, and with the certainty that it is correct, which is not always the case with searches at present.

As regards feu rights already in existence, all that would be necessary would be to bring the usual searches, when required, up to the time of this suggestion coming into operation. The period of search would every year become shorter, and in forty years, all searches made in the present method would be rendered unnecessary in every case.—I am, etc.

J. F. M.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

Pet.—JOHN GRAHAM.—*Jan. 22.*

Entail Amendment Act—What is Intimation?

A petition under the Entail Amendment Act, for authority to uplift consign money, was ordered to be intimated in usual manner, and also to be served on the three next heirs of entail. Service was not made by a messenger-at-arms, but a deed of consent was lodged, in which the three next heirs consented to the prayer of the Petition being granted, and which deed also bore, that a copy of the petition had been subscribed as relative thereto, and that the heirs dispensed with further intimation thereof, and with the induciæ for answering the same. *Held*, that that was sufficient service. The statute prescribed a mode of intimation, but not of service, which was therefore regulated by common law; and under it, a party might dispense with citation, and induciæ in order to avoid delay.

MISS ELIZABETH OSWALD *v.* MRS MARGARET PEARSON AND OTHERS.—*Jan. 22.*

Landlord and Tenant—Mineral Lease—Right to erect buildings.

Miss Oswald of Scotstown let the coal and iron stone of her lands of Skaterigg for nineteen years to the late John Pearson. Subsequently she let the lands themselves to him for nineteen years. The mineral lease expired in 1856; the agricultural lease will not expire till 1862. While in possession under the mineral lease, Pearson erected several buildings, which he considerably increased in number while in possession under both leases. The mineral lease conferred no power to erect buildings; the agricultural lease, reserved no power to the landlord or mineral tenant to do so. The buildings were chiefly occupied by colliers, and used for purposes connected with the mineral lease. Mr Pearson died in 1854. His representatives removed in 1856 from all the subjects under the mineral lease. The landlord then presented a summary petition for their ejection from the buildings, consisting of smiths' shops, wrights' shops, slaughter house, sheds, and workmen's houses, two weighing-houses, colliers' houses near the engine pits, and store, and store-keeper's house. *Pleaded*—These buildings were truly necessary to the mineral lease, and the tenant's right to possess them fell on expiry of that lease. *Replied*—The buildings were not included in the mineral lease, and were not erected in virtue of it but of the agricultural or surface lease, during the subsistence of which the tenant was entitled to possess them. *Held* (after proof)—That there were no sufficient *termini habiles* to support the action as laid; but power reserved to proceed by new action, if necessary, to compel the defenders to remove from, and yield possession of, any engine, or weighing-house, or other accommodation, which could be fairly shown to fall within the mineral lease, and to the defenders their answers as accords.

THOMAS M. McNEILL HAMILTON *v.* HENDERSON AND OTHERS.—*Jan. 29.*

Trust—Heritable and Moveable.

By antenuptial contract of marriage, executed in 1824, the late Mr Bruce conveyed to himself and the heirs of the marriage the lands of Broomhill, which were then vested in him, but burdened with a heritable security of L.3000. Subsequently in 1832, Mr Bruce executed a trust deed, by which he conveyed to trustees Broomhill, and his other heritable and moveable estate. The trust deed contained the usual obligation to pay the truster's debts; but it did not impose on the trustees any express obligation to discharge the debt of

L.3000. Mr McNeill Hamilton, husband of the only child of the marriage, is now, in right of his wife, and of a decree of the Court of Session, entitled to the lands of Broomhill as conveyed by the marriage contract of 1824, and as withdrawn from Mr Bruce's trust disposition of 1832, in respect that the conveyance thereof, and of heritage to the trustees was *contra fidem tabularum nuptialium*. He now called on Mr Bruce's trustees to relieve the lands of Broomhill of the heritable debt of L.3000. *Held*—That as the trust deed of 1832 must be read as not including Broomhill or other heritage, a conveyance of moveable estate to trustees, with a general direction to pay the debts of the truster, does not relieve the heir from payment of a debt secured as a real burden on the land.

ARCHIBALD CRAWFORD v. WILLIAM PATERSON.—Feb. 4.

Decree Arbitral—Reduction—Right of parties to be heard.

Reduction of a decree arbitral pronounced by an oversman chosen by two arbiters, in terms of a power conferred upon them by a submission. The choice of the oversman, and his acceptance, were amongst the earliest proceedings in the submission. The parties and their agents acquiesced in his presence at some important proceedings before the arbiters differed in opinion, and devolved the decision of the case upon him. One minute bore, that the parties having met along with the agents "before the arbiters and oversman hereby consent to close the record," and the interlocutor closing the record was subscribed both by the arbiters and oversman. The proof on both sides—and at which, both the parties and their agents were present—was taken before the oversman as well as the arbiters, and the former took a share in the examination of witnesses as well as the latter. After the proof was concluded, the case was fully debated by the agents for the parties, in presence of the arbiters and oversman. Both parties then stated that they had concluded, and exhausted their observations. The arbiters differed in opinion, and referred the whole matter to the oversman, who thereupon issued the draft of his proposed decree arbitral. The draft was adverse to the present pursuer, who then claimed to be again heard; but the oversman refused to hear him, and issued his award. The pursuer now sought to reduce it, on the ground, mainly, that he had not been heard. He pleaded that, under any circumstances, this was matter of right; that, although the oversman was present at the proceedings, he was not so officially; and that this made a great difference in his feeling of responsibility, and consequently, in the attention which he would pay to the proof, and arguments of parties. *Replied*—The oversman was present with the consent of both parties, according to an economical practice which extensively prevailed, that the oversman should be associated with the arbiters, so as to save the expense of a repetition of the proceedings. *Held*—That the objection was too critical. The demand was, not to be heard on any new argument, or piece of evidence recently discovered, but for a rehearing on what the oversman had already heard fully discussed. The oversman's refusal did not interfere with the rights of parties, or the justice of the case.

Pet.—J. A. G. CAMPBELL.—Feb. 5.

Entail Amendment Acts—Amendment of Petition.

Petition under the Entail Amendment Acts for authority to grant bonds for improvement outlay. The Act 11 and 12 Vict. requires the names, designations, and places of abode of the succeeding heirs, and their guardians, if they have any, to be set forth in the petition. In the present instance, the next heir of entail was only designed as the petitioner's son, Gavin Campbell, who is in pupillarity, and whose legal guardian was the petitioner. Leave granted to amend the petition by adding to the designation of the next heir, "residing with the petitioner at No. 40, Margaret Street, Cavendish Square, London."

MILLER v. LOGAN.—Feb. 5.

Process—Advocation—Expense of Printing.

In an advocation, the Lord Ordinary, at first calling, pronounced this inter-

locutor: "Upon the motion of the respondent," "reports the cause to the First Division, and appoints the record and proof, etc., to be printed and boxed for the judges, and grants warrant for enrolling in the Inner House Rolls." In the meantime, the respondent became bankrupt, and the advocator, on whom there was no obligation to print by the interlocutor or the statute, wished intimation made to the respondent's trustees of the dependence of the action, and of the order to print. The Lord Ordinary reported the point, whether the advocator could get such intimation, and if so, whether in the Inner or Outer House? *Held*—That such a motion was competent, and ought to be made before the Lord Ordinary, before whom the process still depended. Any difficulty arose from the erroneous form adopted in the Lord Ordinary's interlocutor, which ought to order printing and boxing, with a view to reporting.

GEORGE LAING v. PETER WESTERN.—Feb. 9.

Transaction—Retention in Security.

Laing made offer by letter to Western, to take the premises occupied by him as a shop, if the landlord should grant him a lease for five years; and if so, to take the fittings, etc., "and with the same, take goods from your present stock to the extent of in all £800 sterling. About one-fifth to be plated goods, the rest chains, etc., and all in new condition at invoice prices." On entry at Whitsunday, to pay £350 to account, and the balance in instalments of £150, at six, twelve, and eighteen months, respectively. Western accepted the offer, and handed over goods amounting in value to £799, 13s. 2d., as per lists, to the last of which was appended this docquet: "The foregoing goods warranted in good order,—objections to any found damaged to be made before the end of the month." At Whitsunday, Laing paid £350 to account; and within a month of receiving the goods, Laing objected by letter to certain portions of them, and added, "Meanwhile, excepting the electro-plated goods, I must hold the whole in my hands as security for the payment already made." He did not offer to return the goods. Western declined to give effect to the objections of Laing, who thereupon presented a petition to the sheriff for an order on Western to remove the goods objected to, and also for a remit to a duly qualified person to inspect and report upon the damaged goods. Western objected that Laing had previously, after an examination, selected the goods. He pleaded that Laing retained the goods *suo periculo*; and that, after the intimation of retention, which was not modified by any offer to return the goods, he was barred *personali exceptione*, from insisting in the petition. *Held*—That Laing had timeously objected to the goods handed to him, and that he was entitled to have remit, to ascertain whether the goods were so damaged as to justify him in rejecting them.

CARSWELL'S TRUSTEES v. CARSWELL AND OTHERS.—Feb. 9.

Heritable and Moveable—Clause—Construction.

A testator conveyed in trust his whole estate, heritable and moveable; one of the purposes was to pay to his widow, besides the provisions in her contract of marriage, an additional annuity of £50, and to allow her a lifeferent right to the use of his cottage at Dunoon, and of the whole household furniture, etc., which might be in it at the time of his death. But, in the event of her entering into a second marriage, the annuity was to be reduced by one-half, and her lifeferent of the cottage and furniture was to cease, and determine. The ultimate beneficiaries in his whole estate were his children. By subsequent codicil, he provided for the disposal of certain of his heritable property; he declared that the household furniture in his cottages at Dunoon, in place of being his wife's in lifeferent, should be her sole property; adding, that "after her death, the said two cottages (but not the furniture) shall fall into my heirs;" further, providing for the comfort of his wife's mother, if she should outlive his wife; and, finally, "I also provide and declare, that the whole household furniture and plenishing, bed and table-linen, silver-plate, pictures, books, and whole other moveable estate, which, at the time of my death, all which shall be the

sole property of my wife (Marion Fife), but with the exception, that in case of marriage, that it shall recur back to the family, along with the heritable property." *Held*, on a construction of the words, "and whole other moveable estate," that the codicil did not convey to the widow any right or interest to that portion of the estate which consisted of money, debts, or rents due to the testator, or shares of stock; but that the moveable estate bestowed upon her was limited to corporeal moveables, wherever situated, at the testator's death.

ROBERT JAMES WILKIE.—*Feb. 10.*

Process—Is a Petition for recall properly an Inner House process?

The petitioner, having recently acquired a right adverse to the interest of an estate, upon which, some years ago, he had been appointed judicial factor, presented a petition to the First Division for recall of his factory, for his exoneration and discharge, and for the appointment of a new factor. The recent statute directs, that petitions for exoneration and discharge shall be presented to the Lord Ordinary; but contains no provision for petitions for recall. The Court expressed doubts of the competency of the petition; but in the meantime ordered intimation. The petition was afterwards, without remark, emitted to the Lord Ordinary.

ANTHONY DUFFY v. JOHN KERR GRAY.—*Feb. 11.*

Landlord and Tenant—Sequestration—Competency.

Duffy was tenant of business premises and of a dwelling-house under the Parliamentary Trustees of Greenock. Gray was their clerk, and as such, he presented a petition on 7th September 1852 to the sheriff, in which, for the reasons set forth "in the annexed statement of facts," he prayed for sequestration of the effects on the premises, in security, and for payment of the rent of £50, and for warrant to sell as much as would satisfy the rent, under the allegation (contained in the prayer), that the pursuer had deserted the premises and dwelling-house, and carried off his effects, and for warrant to let the premises. The annexed statement of facts did not allege that there was any rent due, but only that Duffy had carried off his utensils and furniture. In his pleas, the petitioner pleaded that he was entitled to sell sequestered effects, the term of payment being first come and bygone. The officers, in executing the sequestration, dismantled the parlour, and removed the furniture into the principal bed-room, which they locked up, and which also contained the wearing apparel of Duffy's wife and children. A record was made up under the petition. Duffy pleaded, that it was incompetent to sell the effects, and let the premises, as he had not abandoned them; and also, that he was not liable for rent, in so far as he had been deprived of the possession of part of his premises; and also, that the petition was incompetent, in respect it prayed for immediate sale—the term of payment having not arrived, and there being no allegation of rent due at the term, and before the record was made up, he consigned the rent. The sheriff dismissed the petition, in so far as it prayed for immediate sale, and also for warrant to let. Thereafter proof was led, and the sheriff found, that the petitioner was justified in sequestering, to secure the rent due as at Whitsunday 1853; but that the storing of the furniture was unjustifiable; and therefore granting warrant of sale as for the rent due at Whitsunday 1853. In a reduction of these proceedings, *Held*—That the sheriff's interlocutor dismissing the petition, in so far as it prayed for immediate sale, did not wholly dismiss the petition as to the conclusion for sale; and, therefore, although the petition was awkwardly framed, that the warrant to sell the sequestered effects was competently granted. The mode of executing the sequestration could only affect the expenses of process.

JAMES SUTTER AND OTHERS v. THE ABERDEEN ARCTIC COMPANY.—*Feb. 12.*

Process—Jury Trial—Commission to take Evidence.

Each of two ships' crews claimed right to a whale captured in the Greenland fishery. In an action between the respective owners of the ships to determine

the question, the record having been closed but issues not adjusted, the defenders moved for a commission to examine several sailors in their employment, who were on the eve of sailing for the Greenland fishery. The nature of their employment increased the natural hazards of the sea, and rendered it not improbable that the evidence of at least some of the defenders' witnesses would be lost. *Replied*—The pursuers were willing to delay the trial till the return of the ships; and, in the meantime, both parties would be on an equal footing, as the pursuers' witnesses had some of them already sailed, and the others were about to sail for Greenland. *Held*, that the commission should be granted; injustice might arise from withholding it, none by granting it. The pursuers, if they chose, might have had the same advantage. The witnesses were engaged in a precarious employment, and were also going beyond the reach of the process of Court—two considerations which always greatly weighed in favour of granting such commissions.

BRITISH LINEN COMPANY v. MONTEITH.—Feb. 12.

Liability of Cautioners.

Held, that advances on a cash credit bond may be recovered from the representatives of a cautioner in the bond, though the advances had been made after the death of the cautioner, and though no intimation of the obligation had been made to the representatives by the bank. The natural obligation of informing the representatives of such obligation lay, not upon the bank, but upon the cautioner.

PET. REV. W. LEARMONTH.—Feb. 13.

Sequestration.—Can a Commissioner act as Agent for the Trustee?

Learmonth having been sequestrated, presented a petition for discharge, which was successfully opposed by his trustee. The petitioner was found liable in expenses. On the motion for approval of the auditor's report, and for decree for the taxed amount of expenses, *Objected* by the petitioner, that the trustee had employed as his agent one of the commissioners in the sequestration, which office was of so fiduciary a character, that he was not entitled to charge for business done by him connected with the estate. *Replied*—Such an objection could only be stated by the general body of creditors; it was *jus tertii* to the petitioner to state it. Further, the office of commissioner was not fiduciary; but merely formal, for the purpose of advising with the trustee as to the general management of the estate. *Held* unnecessary to decide the general question, in respect the petitioner was not entitled to state this objection. He did not represent the trust, but, on the contrary, had been litigating with it, and, having been unsuccessful, must pay expenses.

CHARLES LYALL v. DAVID MAY.—Feb. 17.

Common Property.

Two mills were supplied from the same mill-dam by a common lade. Lyall's mill was the upper mill of the two. In February 1855 the driving-wheel of May's mill was frozen, and the bye-shot by which the water of the lade was carried off when the mill was not working became choked with ice, and incapable of discharging the water. In consequence the water flooded May's mill, to stop which, his foreman partially closed the sluices of the dam. Lyall's servants on hearing this, again opened the sluices; and Lyall, although remonstrated with, refused to allow the sluices to be closed. His own mill was not working. In an action of damages by May against him, *Held*, on proof, that he had failed to substantiate any ground, whether of preferable right of regulation of the common water, or of the custom of milling in regard to common mill-lades, for his refusal to allow the damheads to be closed, and therefore that he was liable in damages.

ALEXANDER HAY v. JAMES BLACKWOOD.—Feb. 19.

Bill—Suspension—Joint Adventure.

Hay charged Blackwood upon a bill for L.350, which Blackwood suspended

on the ground that it was an accommodation bill. Hay and Blackwood were joint adventurers, along with certain other parties, which adventure had resulted in a loss. It had been arranged that Hay was to be the active manager of the adventure; Blackwood was to furnish funds, and it was for the purpose of providing the necessary outlay in connection with the transaction that the bill in question was granted. Blackwood's share of the loss was said to be L.307, 9s. 11d., to which Hay now restricted his charge. He pleaded that where one adventurer gave his services, and the other engaged to provide funds, a bill drawn on, and accepted by the latter, in favour of the former, was "for value received;" and that the onus of proving that it was an accommodation bill lay on the suspender. *Replied*—The bill is, on the charger's own admission, an accommodation bill, in the sense that the parties put their names to it for their mutual benefit—each being thus debtor in it. That being so, it was not entitled to the privileges of an onerous bill. *Held*—That the drawer was not entitled to do summary diligence on the bill, which was clearly granted for the mutual advantage of both parties, and was therefore not to be regarded as a bill for value. The restriction of the charge showed that the amount due depended on the result of an accounting between the adventurers. Therefore process sisted till an action of accounting should be brought.

SECOND DIVISION.

TOD v. MITCHELL.—Jan. 26.

Poor Assessment—Unoccupied property—Process—Competency—Stat. 8 and 9 Vict., c. 83, sect. 34.

The mode of assessment for relief of the poor in the parish of Cockpen was that prescribed by sect. 34 of the statute 8 and 9 Vict., c. 83, of imposing one half upon the owners and the other half upon the tenants or occupants of lands and heritages. By sect. 38 of the statute, the annual value is to be "taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year," under certain deductions. The suspender was proprietor of about forty houses, seven of which were unoccupied, and the others let at small rents. He was willing to be assessed upon the actual rents, but he objected to the assessment so far as imposed in respect of the unoccupied houses. The amount complained of was only a few shillings. In a suspension of a charge for a half-year's assessment, Lord Neaves (Ordinary) repelled the reasons of suspension, and held, on the merits, that the assessment was valid. The Inner House adhered; the Lord Justice-Clerk and Lord Murray giving no opinion on the merits, but holding that it was incompetent in a suspension to entertain a question relating to so trivial a sum, when the decision could only deal with that particular sum of assessment, and could decide no general principle; Lord Cowan, on the other hand, agreeing with the Lord Ordinary on the merits, but differing from the other judges on the point of competency of process.

BARSTOW v. STEWART OR MACLAUCHLAN AND OTHERS.—Jan. 27.

Seisin—Fee and Liferent.

By his marriage contract, Maclauchlan became bound to pay to his wife a liferent annuity of L.150 after his death, and in security thereof, and as a provision for the children to be procreated of the marriage, he became bound to pay to his wife, for her liferent use alienarly, and to the children in fee, the sum of L.3000, and conveyed in security of the jointure and principal sum certain lands; the marriage contract contained a precept of seisin, on which seisin was expedite. In an action of multiplepinding and exoneration, at the instance of the trustee for behoof of Maclauchlan's creditors, a claim on behalf of the children to be preferred to the extent of the provision in their favour, was objected to, on the ground that their right of fee was not constituted by seisi

in any habile or correct manner. The precept directed seisin to be given to "the said Isabella Stewart, and to the said child or children of the said marriage, for their respective rights of liferent and fee as aforesaid," etc. The seisin bore, that seisin was given to "the said Isabella Stewart, for herself, and for behoof of the said child or children of the said marriage, for their respective rights of liferent and fee as aforesaid." The Court sustained the claim of the children, and repelled the objection to the seisin, that it was not in terms of the precept, seisin not having been given to the children, as directed.

Authorities.—Bell's Pr., sects. 1711 to 1715; Frog's Creditors, iii. Ross' leading cases, p. 602; Falconer v. Wright, 27th Jan. 1824, iii. Ross, p. 662; Howlditch v. Spalding, 9th June 1847, ix. D., p. 1204; Brown v. Govan, 1st Feb. 1812, Fac. Col.; Bushby v. Rennie, 23d June 1825, iv. S. and D., p. 110; Herries, Farquhar and Co. v. Brown, 9th March 1838, xvi. S. and D., p. 948.

THE SCOTTISH PROVINCIAL INSURANCE v. PRINGLE AND OTHERS, ET E CONTRA.—
Jan. 28. .

Forgery—Liability of Cautioners.

The Insurance Company agreed to lend M'Leod L.150 on a bond by which Pringle and three other parties became cautioners for repayment of the loan. The bond was given to M'Leod, to be signed by the cautioners, and the money was paid to him, when he returned it with the signatures of the whole cautioners. It turned out that he had forged the signature of one of them. M'Leod failed; and the Insurance Company raised an action against Pringle and the other two cautioners, whose subscriptions were genuine. They raised a reduction; the actions were conjoined. The Lord Ordinary (Mackenzie) assailed Pringle and others, and reduced the bond. The Insurance Company reclaimed, and pleaded, the parties who signed took the risk that the whole parties to the bond would do so; it was not the duty of the creditor to procure the signatures; and the cautioners being all liable *in solido*, it was their duty either to see that the whole obligants signed, or bargain that the creditor should see that all did so. The Court adhered.

Authorities.—Gordon v. Sutherland, 20th January 1761, Mor., p. 14,677; Macdonald v. Stewart, 5th July 1810, Fac. Col.; Macartney v. Scott, 18 V. W. and S., p. 504; M'Dougall's Executors v. Wighton, 13th Nov. 1830, ix. S. and D., p. 12; Hollier v. Eyre, in H. L., 2d May 1842, ix. Clark and Fin. p. 1; Patterson v. Bonar, 9th March 1844, ix. D., p. 993; Esplin v. British Linen Bank, 6th June 1849, xi. D., p. 1104; British Linen Bank v. Thomson, 25th January 1853, xv. D., p. 314; Burrige, 25th Feb. 1856 (Chancery). xx, Eng. Jurist; Church of England Life Insurance Co, 17th July 1857. xix. D., pp. 114, 1079.

HAY v. MELVILLE.—Feb. 3.

Poor—Relief—Cost of Inspection of Paupers—Removal—Stat. 8 and 9 Vic.
c. 83, sects. 33, 55, 70, 72.

A pauper became destitute in the city parish of Edinburgh, and was relieved by that parish, and still resides there. Burntisland, the parish of settlement, admitted liability for all advances; Edinburgh claimed, in addition, as reimbursement for the cost of visiting and taking charge of the pauper, a per centage on the sum advanced. The Court found—That the Inspector of Edinburgh was bound to visit and inspect all paupers resident in the parish, so long as they received relief through him, wherever their settlement might be: that the parish was not entitled to charge for trouble or expense in respect of such inspection; but that, under sect. 72 of the statute, the parish of residence might remove the pauper to the parish of settlement, unless the latter should make provision for the pauper's subsistence in Edinburgh, not merely by making an offer to pay aliment, but by such an offer to afford aliment as might be satisfactory to the parish of residence.

HAY v. CROLL, ETC.—Feb. 5.

Poor—Residential Settlement—Does a Soldier lose his Settlement by absence on Duty?—Stat. 8 and 9 Vict., c. 83, sect. 76.

Stark had a residential settlement in the parish of Canongate in 1825, when he enlisted and went abroad with his regiment. His wife and child became paupers in 1843, and received relief from the city parish of Edinburgh. He returned in 1847, and supported them for a short time, until he died, when they again received relief. Perth was the parish of his birth. It was maintained, that having been absent from Canongate continuously from 1825 to 1847, he had, under sect. 76 of the Poor-law Amendment Act, lost his residential settlement by an absence of more than five years. *Held*—That he had not lost his settlement in the parish of Canongate; the Lord Justice-Clerk being of opinion that the absence of a soldier in the service of his country, was not such absence as had the effect of losing a settlement; Lord Cowan being of opinion that the enactment did not apply, in respect of the provision that it should not apply to parties who had become proper objects of parochial relief previous to the passing of the Act in 1845.

COURT OF SESSION (SCOTLAND).

RETURN of the number of causes instituted and decided in the Court of Session in Scotland, between the 1st day of January 1857, and the 1st day of January 1858, showing the number of causes ready for judgment, but not disposed of at the last of these dates :—

OUTER HOUSE.

Names of Lords Ordinary.	Number of Causes for the first time en- rolled before each Lord Ordinary.	Number of De- crees in Absence.	Number of Final Judg- ments pro- nounced in Liti- gated Causes.	Number of Causes ready for Debate, but not heard, with the Date when the first of these Causes was first en- rolled in the Debate Roll.	Number of Causes at Avi- zandum.
1. Lord Handyside	271	89	69	23 - 10 July 1857	5
2. Lord Benholme	328	93	116	12 - 26 Nov. "	3
3. Lord Neaves	104	43	115	33 - 20 Jan. "	4
4. Lord Ardmillan	507	174	211*	41 - 25 June "	1
5. Lord Mackenzie	178	64	91†	45 - 27 Jan. "	2
	1,388	463	592	154	15

* Including 48 judgments in Exchequer Causes.

† This does not include Final Judgments pronounced by him in the Bill Chamber as Junior Lord Ordinary, nor does it include the numerous judgments pronounced and work done by him in the matters of petitions, etc., under the statute 20 and 21 Vict., c. 56.

INNER HOUSE.

	Number of Reclaiming Notes presented against Judgments of Lords Ordinary in the course of the above Year.	Number of Incidental and Summary Applications presented during the said Period, distinguishing those which have passed as Matter of Form from such as have been followed by Litigation.	Number of Final Judgments pronounced in Litigated Causes, without the Intervention of a Jury.	Number of Cases Tried by Jury.	Number of Cases ready for Judgment on hearing Counsel, or otherwise, with the Date when the first of such Cases was so ready, and distinguishing those to be Tried by Jury from such as are not to be so Tried.
First Division	191	Form - 604* Litigation 90 694	226	13	Ordinary 120 The first of which was so ready 9 Jan. 120† 1856. Jury - - —
Second Division	122	Form - 528* Litigation 67 595	139	6	Ordinary 126 The first of which was so ready 5 July 126† 1856. Jury - - — 5 July

* There are many cases which, being of the nature of unopposed proceedings, cannot be classed as "Litigated Causes," but which, nevertheless, do not pass as matters of form; *e. g.*, applications for authority to disentail, or to grant feus of portions of entailed estates, or to charge entailed estates with sums of money, or bonds of annual rent; or for authority to apply money derived from sales of portions of entailed estates; or for authority to sell portions of estates belonging to pupils or lunatics, or otherwise connected with the management of the estates of pupils or lunatics. In these and similar cases, the authority and power of control vested in the Court implies an amount of investigation and deliberation which renders necessary in many cases much procedure and discussion, both as to fact and law, before the Court is fully satisfied that the application should be granted, or, as sometimes is the result, should be refused. These cases, not being in a strict sense "Litigated Causes," are included in the cases returned under the word "Form," being the only other class which the statutory schedule affords, although it would be altogether incorrect to say that they "have passed as matters of form." The number of final judgments pronounced in such cases is not included in the return of final judgments, these being limited by the statutory schedule to "Litigated Causes."

† Besides the above, there are two causes at *avizandum*.

DUNCAN M'NEILL, *Lord President*.

JOURNAL OF JURISPRUDENCE.

CRIMINAL RESPONSIBILITY.¹

Of the problems of modern jurisprudence, none perhaps is of more theoretic interest, practical importance, and constant occurrence, than the question of Criminal Responsibility.

All government or law presupposes the existence of responsible beings,—the justice both of Divine and of human punishment being founded on the responsibility of the offender. An irresponsible being is not a subject for reward or punishment, in the proper sense of the terms. Vice and virtue, guilt and innocence, are attributes of responsible beings alone; and their degree is dependent upon the degree of the person's responsibility of whom they are predicated.

The moral responsibility of an agent depends on his knowledge of moral good and evil, and his power to choose the one and avoid the other. Legal responsibility is founded on the supposition, that the members of a community have a knowledge of right and wrong in relation to the laws of that community, and are free to act in consonance with such knowledge. Moral and legal responsibility are, therefore, alike in principle,—the latter being an application of the former to a more limited class of actions. From the perfection of the Divine system of government, it necessarily follows that, under it, punishment must always be exactly proportioned, not only to the abstract, but also to the relative, heinousness of the offence,—such relative heinousness being dependent on the responsibility of the offender.

Human government, on the other hand, is necessarily imperfect in knowledge, deficient in power, and confined in jurisdiction. It cannot penetrate into the recesses of the offender's mind, and there trace the various mingling elements at work which constitute responsibility in its innumerable shades and degrees. And even were it possessed of this insight, its deficiency in penal administrative power, and the necessary generality of its scale of punishment, must

¹ Bucknill on Criminal Lunacy. 2d Edition, London, 1857. Longman, Brown, Green, Longmans, and Roberts.

prevent any perfectly exact proportionment of the penalty to the relative heinousness of the offence.

Not only is human government defective in its means of acquiring information as to the degree of responsibility, and in its machinery for proportioning the punishment to the offence, it is also confined in its jurisdiction to a limited class of offences.

Its province is to restrain and punish crime, as the transgression of its own law: over evil, as a simple breach of morality, it has no jurisdiction. Human law is a system of rules for the guidance of man as a social being. It owes its origin and its force to the fact of man's being the member of a community; it takes cognizance, not of his sins, but of his crimes—not of his offences against God or himself, but of his offences against society.

But although thus limited in its jurisdiction, human government, to be just, must, in its own sphere, be in accordance with the Divine. It must not command what morality forbids, nor forbid what morality commands. In indifferent matters, as to which no express moral command exists, human law is allowed a greater latitude: it may, from motives of policy or expediency, constitute a crime of that which, without actual legal prohibition, would be no breach of morality.

As human government may ignore offences not affecting the community, and leave their punishment to a higher and more fitting tribunal—as it may consult the interests of society in creating a crime, and affixing to it a penalty,—so also, in graduating its scale of punishments, it may regard the effect of a crime on society more than its actual moral heinousness. When, however, a particular penalty has, in the discretion of the legislator, been attached to a particular offence, the question of the offender's responsibility for that crime is to be decided upon exactly the same grounds, whether the offence be heinous in a moral view, and light in the eyes of the law, or the converse; and the justice of the infliction of the penalty in full, or of its mitigation, must depend on the degree of responsibility possessed by the offender.

The law may regard civil revolt as a crime more gravely affecting the interests of society than blasphemy, and attach to it a severer punishment; but the question of the offender's responsibility for either crime, must be determined by exactly the same principles.

Public policy and motives of expediency justify a government in regulating its scale of punishments, to a certain extent, proportionally to the injurious effects of crime upon society. Government may, however, in this direction, exceed its proper and legitimate limits, and, by affixing to an offence against society a penalty totally disproportionate to its moral heinousness, offer violence to the laws of retributive justice.

A penal code should keep in view the principal objects of punishment—its utility “in deterring others from committing the like crime,” and in the reformation of the criminal. The right of society

to inflict punishment rests not, however, on either of these its effects. Human law has no right to punish one member of a community, simply to deter others from crime. Such punishment would be the height of injustice. Suppose, for instance (a quite possible case), that the punishment of a really innocent party would have the effect of a public warning, and instil in others a wholesome dread of committing the crime for which he was supposed to suffer, can it be maintained that, in such a case, justice will permit the sacrifice of the innocent?

If punishment is regarded as simply a means of reforming the criminal, it is no longer punishment—it is cure. The true idea involved in punishment is overlooked and lost. And even assuming that crime is a species of disease, and that it should be repressed by measures remedial, rather than penal, it is difficult to rest upon grounds consistent with individual liberty the *right* of society to carry out such a system of involuntary cure.

The justice of human punishment springs from the same source, and rests on the same basis, as that of Divine punishment. It rests on retributive justice, an immutable law of morals. In the words of an ingenious writer on criminal law:—"The horror of mind that accompanies every gross crime, produceth in the criminal an impression that all nature is in arms against him. Conscious of meriting the highest punishment, he dreads it from the hand of God and from the hand of man."

Every responsible being is conscious, when he commits a crime, that he deserves punishment. Belief in the justice of punishment, as a direct and necessary consequence of disobeying conscience, is as firmly rooted in man's moral nature, as that in the distinction between good and evil. And upon this universal consciousness of all responsible beings—this essential condition of their responsibility—the justice of human punishment rests.

"La justice, voilà le fondement véritable de la peine; l'utilité personnelle et sociale, n'en est que la conséquence." "La peine n'est pas juste parce qu'elle est utile préventivement ou correctivement, mais elle est utile, et de l'une et de l'autre manière parce qu'elle est juste." "Dans l'intelligence, a l'idée d'injustice correspond celle de peine; et quand l'injustice a eu lieu dans la sphère sociale la punition méritée doit être infligée par la société." (Cousin's Plato, vol. iii., p. 168-9.)

The right of society to punish extending only to those offences by which it is directly or indirectly injured, two things must concur to justify the infliction of human punishment—responsibility on the part of the criminal, and injury to society by the crime.

A system of criminal jurisprudence theoretically perfect, would, after affixing a penalty to a crime in the abstract, mitigate that penalty, in the case of each particular offender, in a ratio exactly proportioned to the degree of his responsibility. Such perfection, although desirable, is not in practice attainable.

No human scale of punishment could be adjusted with nicety sufficient to meet the ever-varying degrees of responsibility; and even did such a graduated scale exist, no human court of justice could rightly apply it to particular cases. No two offenders regarding the same punishment with equal dread or dislike, the penalty would require to be proportioned, not only to the criminal's responsibility, but also to his feelings as to different kinds of punishment. Such graduated nicety of justice is practically unattainable. Legislation must, therefore, of necessity set up general land-marks—extremes, under one or other of which intermediate cases are to be classed.

Justice, however, demands that law shall establish, on true and scientific principles, its rules for determining criminal responsibility, and shall secure the right application of these rules, by affording their administrator the best attainable information as to the facts of the case to which they are to be applied.

The desirability of an improvement, in these respects, in the jurisprudence of our own and the sister country, has been felt and acknowledged: the means by which the practical working of an improved system may be secured, have yet to be discovered.

Although medico-psychological research has in modern times produced substantial results in the department of the physician, and the comparative success that has attended the improved system of treatment of morbid affections of the mind, is undeniable evidence of progressive knowledge; yet the law has refused to alter its pre-existent rules, or modify their inflexibility by these discoveries of modern science.

The law refuses to recognise the various forms and degrees of mental disorder, and corresponding degrees of responsibility.

It also retains tests of responsibility and definitions of insanity, which medical research has pronounced to be always insufficient, and often delusive.

The law regards only two states of mind—sanity and insanity; only two degrees of responsibility—its existence in a perfect form, or its total extinction. This rule, although in all cases theoretically incorrect, is, in the two extremes of ordinary mental health and great mental disorder, practically sufficient for the guidance of a court of law. Although no man has so perfect a knowledge of right and wrong in relation to the laws of a community, and such perfect freedom of will, as to create in him a perfect responsibility; yet, in the ordinary case, knowledge and free-will exist sufficient to render him generally responsible for his actions. While he is in this state, therefore, courts of law have little difficulty in deciding upon his responsibility. In the extreme forms of insanity, also, the law is practically correct in regarding the individual as wholly irresponsible, although, in point of fact, even in these cases, however weak the mind, and however impaired the power of will, perfect negation of either can never be predicated: the most

imbecile of idiots, and the most furious of madmen, still retaining the attribute of responsibility, but to an extent uncognisable by law. Between these two hypothetical extremes of perfect mental health and total extinction of the faculties, there exist innumerable conditions of disease, and corresponding shades and degrees of responsibility. One of the grand problems of criminal jurisprudence, is to establish in this debateable territory the empire of truth and justice.

The meaning of health and disease, as the terms are used ordinarily, is at once understood.

It would, nevertheless, be a fruitless task to attempt a scientific definition of these states, with reference to the physical, moral, or intellectual nature of man. The physician pronounces one man to be in a state of general health, another to be labouring under disease; in the one case, he tells us the physical functions are properly performed, in the other improperly. He, however, uses these terms only in a relative sense: he cannot trace the minute gradations between the one state and the other, and therefore classes many intermediate stages under one or other of the two extremes. Without entering into the discussion of the question, whether mental disease is a concomitant and result of the connection of mind with body,—a question upon which much discussion has thrown little light,—the fact is indisputable, that physical health has not more shades and degrees than intellectual and moral. Perhaps no two individuals have an equal power of discrimination, and an equal freedom of will. The proverbial philosophy of almost every country is an exponent of the fact, that no human mind is, on all points, in a perfect state of sanity.

Lord Campbell, in 1843, said in the House of Lords, "I have heard Dr Haslam say repeatedly, and he would have been ready to prove," "not that there were many who were more or less insane, or that all of us had been insane at one period of our lives, but that we all were insane."—(Hansard, 3d series, vol. lxvii., p. 741.)

Upon this fact, that mental health and disease are states merely comparative, that there is no definite line of demarkation between the one state and the other, all just views of criminal responsibility must be founded. The law of Scotland, however, ignores the existence of such partial mental disorder, and, as stated by Baron Hume (vol. i., p. 36), it requires, "for the purpose of a defence in law, that the disorder amount to an absolute aberration of reason, 'ut continua mentis alienatione, omni intellectu careat.'" In the words of Lord Justice-Clerk (Hope), (Gibson, II. Brown 356,) "the individual must be bereft of reason; there must be an absolute destruction of reason." This rule of our law, which contemplates, in determining an offender's responsibility, only two states—perfect possession or total deprivation of the mental faculties, is false in principle, and totally inapplicable to the great proportion of actually occurring cases in which sanity is called in question. Such an inflexible

line of distinction, having no existence in nature, can, in its application, be productive of nothing but injustice, and chance must in great measure decide whether a criminal only partially responsible, and therefore not amenable to the infliction of the penalty in full, shall be subject to punishment undeserved in amount, or shall entirely escape. But not only is the legal theory of insanity as a mental state hypothetical and unsound, but the legal tests by which disease is determined, are to a certain extent unsupported by scientific observation, and in opposition to the opinions of those who have devoted time to the study, and acquired experience in the treatment of mental disorders.

If possible, it might be desirable that, as regards responsibility, some fixed test of unsoundness of mind should be established; but, from the innumerable shapes and phases which mental derangement assumes, no such abstract definition of insanity can be laid down.

From the inconsistency of the verdicts returned by English juries, in cases where the defence of insanity was attempted to be set up, public attention was directed to the determination of the principles upon which insanity, in its relation to responsibility, affords a legal exemption from punishment. In 1843, after the result of M'Naughten's trial, which presented in its issue so striking a contrast to that of Bellingham, although the offence in both cases had been similar, and committed under almost exactly similar circumstances, the House of Lords, dissatisfied with the unsettled state of matters propounded to the English judges the following questions, in relation to the law respecting alleged crimes committed by persons afflicted with insane delusion.

Lord Chief-Justice Tindal expressed the unanimous opinion of the Judges (with the exception of Maule, J.) as follows:—

“My Lords, Her Majesty's Judges, with the exception of Mr Justice Maule, who has stated his opinion to your Lordships, in answering the questions proposed to them by your Lordships' house, think it right, in the first place, to state, that they have forborne entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case, and as it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing argument of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your Lordships' questions.

“They have, therefore, confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed by your Lordships; and as they deem it unnecessary, in this peculiar case, to deliver their opinions *seriatim*, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your Lordships.

“The first question proposed by your Lordships is this, ‘What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where at the time of the commission of the alleged crime the accused knew he was

acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

"In answer to which question, assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your Lordships to mean the law of the land.

"Your Lordships are pleased to inquire of us, secondly, 'What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?' And thirdly, 'In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?' And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved, that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been, to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

"The fourth question which your Lordships have proposed to us is this:—'If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?' To which question the answer must of course depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real.

"For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character

and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

"The question lastly proposed by your Lordships is:—'Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?' In answer thereto, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

In the case of Gibson (ii. Brown, 355), these opinions were stated by the Lord Justice-Clerk (Hope) "to express the law of Scotland, as well as that of England, on the matter."

The answers to the first and third of these questions seem to be to a certain extent inconsistent and contradictory. In the answer to the first, the law is stated to be, that if the accused knew he was acting contrary to the law of the land, although with a view, under the influence of insane delusion, of redressing some supposed grievance, or of producing some supposed benefit, he is nevertheless liable to the punishment affixed to the offence. In the answer to the third question, it is said, "If the accused was conscious that the act was one *which he ought not to do*, and if that act was at the same time contrary to the law of the land, he is punishable."

These two statements are very different,—the first declaring all those to be punishable as responsible agents who, under the influence of some imaginary necessity superior to human law—as, for instance, an insane belief in a Divine command, or a supreme moral duty,—commit an act which, while they know it to be in opposition to the law of the land, they believe to be in obedience to a power superior to that law; the second holding those only to be punishable, who commit an act which they feel to be wrong, and which act is contrary to the law. The first of these rules, if carried into effect, would be productive of most cruel injustice; and the miserable victim of a delusion, who, believing himself like the patriarch to be under a Divine command, sacrifices his child in obedience to it, although against his own natural feelings, would, instead of arousing that pity and sympathy which his misfortunes demand, receive the doom of a common murderer. An instance of such a delusion is narrated by a late writer¹:—"A poor woman, imbued with the sentiments of piety and maternal affection, suffocated her two children between pillows, because she had been told by the Holy Ghost to do so, in order that they might inherit the kingdom of heaven." "In the

¹ Bucknill on Criminal Lunacy, p. 63.

after of her offence, she believed that she performed a righteous deed; she knew, indeed, that she was transgressing the laws of men, but what were they in comparison with the direct mandate of the Most High?" Can it be maintained that one so miserably deluded is a responsible agent, or a subject for punishment?

In these opinions of the judges, an important distinction is taken between knowledge of right and wrong in the abstract, and knowledge of right and wrong with respect to the particular act charged. In England, this distinction seems previously to have been overlooked. Its importance, however, has always been recognised in Scotland. Baron Hume (i. 36, 37) uses the most cogent arguments to prove that "it is only in the special sense, as relative to the particular thing done, and the condition of the man's belief and consciousness on that occasion, that an inquiry concerning his intelligence of moral good or evil is material to the issue of his trial."

The answer to the fourth question presents a seemingly simple solution to a very difficult problem.

When a party, acting under the influence of an insane delusion, commits an act contrary to law, his responsibility for that act (say the judges) is to be judged of as if the facts with respect to which the delusion exists were real. If the law would have excused the act had the delusive motive been real, the offender acting under its influence is to be absolved; if the law does not regard such motive as an exculpation, he is to be punished. This rule would be just and unexceptionable, did such a partial delusion exist as to leave the party the full and free exercise of his judgment and will in acting on the imaginary grounds it supplies.

Such a case, however, has no existence in reality. Insanity is subjective, not objective; it is a disease of the mind itself, and any delusion on a particular point is not a thing apart from the healthy mind, but merely a manifestation of diseased mental action. Where insanity manifests itself in this form of insane delusion, it is utterly impossible to determine satisfactorily that the delusion, and the acts that follow upon it, are not linked together by a deranged mental process, however indirect and unapparent.

Moral insanity, as defined by Prichard, consists "in a morbid perversion of the natural feelings, affections, inclinations, tempers, habits, and moral dispositions, without any notable lesion of the intellect, or knowing and reasoning faculties, and particularly without any maniacal hallucination."

The existence of this species of insanity is not recognised by the law of England as affording an exemption from punishment.

The Lord Justice-Clerk enunciated the same doctrine as the law of Scotland, in his charge to the jury in the case of Smith, Jan. 1855 (Irvine, ii. 591). "The law (said he) does not for one moment countenance the notion of moral insanity, which is largely written and treated by numerous authors—that is to say, what they call

irresistible impulses, by which a man is driven into crime, while it is not proved that his reason is destroyed."

While the law thus refuses to entertain the defence of moral insanity, the observations of those who have devoted themselves to the study of morbid affections of mind would seem to establish its existence. The records of lunatic asylums prove that a very large per-centage of cases of undoubted insanity are the result of moral causes; and there seems to be no good ground for denying that a derangement of the moral powers may exist, unaccompanied by any marked or perceptible affection of the understanding.

On the part of medical observers, there is almost unanimity in the belief of the reality of this species of insanity, in which the party affected, although aware of the sinful and criminal nature of the act, and regarding it with abhorrence, is impelled by an irresistible impulse to its commission.

In the United States, moral insanity is recognised as a legal ground of responsibility, "the present tendency of judicial practice there being, when the defence of monomania is set up, to tell the jury that, if they believe that the act was committed under an involuntary and uncontrollable insane impulse, the defendant is entitled to an acquittal, on this particular ground."¹

In support of this notion, many American cases might be adduced. An instance of such an acquittal is recorded in the case of *U.S. v. Hewson* (7 Bost. Law Rep. 361), in which Judge Story refused to allow the conviction of a young woman, who, in a fit of puerperal mania, threw her infant overboard a vessel, though she was perfectly conscious of the enormity of the act.

Where, as in the late case of *Walker* (Dec. 1857), a crime opposed to all the feelings of humanity is committed without a motive conceivable by a sane agent, would it not be well to consider, before the last punishment of the law is carried into effect, whether the possibility of the offence having been committed under such a blind, uncontrollable impulse should relieve from complete responsibility?

From the unity of the human mind, it follows of necessity, that if one set of functions be deranged, the others cannot retain a perfectly healthy action. "It is contrary," says Schürmayer,² "to all received psychological theories, to suppose that a particular passion or moral relation can become depraved, without an intellectual inflection to some extent corresponding." In the words of Lord Brougham, "That being or object which is called mind, if unsound in one point, is unsound in every respect, so long as that which causes the unsoundness exists in the mind." The reason and intellectual powers of a party affected by moral insanity may be apparently sound and unaffected, but this must be only in appearance,—the non-detection of intellectual derangement being accounted for by the impossibility of direct observation of the work-

¹ Wharton and Stillé's *Med. Jur.*, p. 147.

² *Gericht Medicin*, Erlangen, 1850, sect. 549.

ing of the mental functions. Only in this view of the case can the theory of moral insanity be supported. In practice, however, from the difficulty of detecting slight intellectual aberration, although present, clear proof of the existence of moral derangement taking the form of an uncontrollable impulse, should be held *per se* to impair responsibility.

In all cases where insanity constitutes the defence, the point of most importance, and the one most difficult to ascertain satisfactorily, is the actual state of the accused's mind at the time of committing the offence. The medical profession and the legal differ in opinion as to who the parties are best qualified to determine this point. The law regards this as a question for a jury to decide, taking into consideration the sufficiency of the whole evidence that has been laid before them. The Lord Justice-Clerk told the jury in the case of Gibson, "You, as a jury, are entitled to exercise your own judgment; and, rely upon it, the decision at which you arrive will be nearer the truth than that of any body of medical witnesses." This, perhaps, placed the duty of a jury in too strong a light; for, although it is no doubt true that the definitions of insanity given by medical writers are speculative and varying, and that difference of opinion often does exist among medical men on the sanity of an individual, yet the question is not, whether those who have by study and observation acquired a knowledge of mental disease may fall into mistake, but whether men possessed of such knowledge are in general less liable to err than a common jury, who have never devoted attention to the subject.

To prove that the verdicts of juries, in determining insanity, are often irreconcilable, it is unnecessary to refer to the English cases; the two leading cases in the law of Scotland (Gibson, Dec. 1844, and Smith, Jan. 1855) offering a very striking example of such inconsistency.

Insanity may be pled in bar of trial, as a defence against the charge, or in bar of execution of sentence.

In the first and last of these cases, the actual presence of insanity at the date of its being pled is the point to be determined.

Where insanity is urged as a defence against the charge, the question for the jury to try is, whether the party was insane, and therefore irresponsible, at the time of committing the act charged. Medical writers strongly object to this question being left to a jury, and urge "the necessity of discovering some more fitting tribunal to decide upon the delicate question of insanity, than that rough instrument of justice" (Bucknill, p. 120). *C'est aux lumieres et à la probité des médecins que doit être exclusivement réservée le droit de juger chaque espèce de aliénation mentale* (Med. Leg. Orfila, i. 360). These objections apply only to the misuse of jury trial; because, if rightly directed, the jury will be guided in coming to a verdict by the evidence of professional men. In questions of this description, as in others requiring peculiar knowledge and expe-

rience, and not lying within the scope of ordinary observation, the opinion of those who possess such experience is part of the law, and should influence the decision of the jury. It is to be regretted that medical witnesses should (as sometimes happens) forget the impartial position which it is theirs to occupy, and attach themselves too strongly to the case either of the prosecutor or of the accused. This would, perhaps, be remedied by the Court itself appointing medical examiners, who as *amici curiæ* might deliver an unbiassed opinion, and one to which greater weight would attach. From the fact of their being selected by the Court, the jury would have full confidence in their professional experience and ability.

The English judges gave it as their opinion, that where the facts are admitted or not disputed, and the question as to the state of the prisoner's mind becomes substantially one of science only, it may be convenient to allow it to be put in the general form, though the same cannot be insisted on as a matter of right. It is competent, by the law of Scotland, to ask the opinion of a medical witness as to the sanity of the accused, upon a hypothetical state of the facts. In America, the usual practice is to put the question to the professional witness, who has attended the whole trial, and heard the testimony of the other witnesses as to the facts and circumstances of the case, in this form:—"If the symptoms and indications testified to by the other witnesses are proved, and if the jury are satisfied of the truth of them, whether, in their opinion, the party was insane, and what was the nature and character of that insanity; what state of mind did they indicate; and what they would expect would be the conduct of such a person in any supposed circumstances."

THE NEW STATUTE LAW.

THE REGISTRATION OF LEASES ACT.

III. EFFECT OF REGISTRATION (*continued*).

THE direct effects produced upon a lease by registration under this Act, were considered in last article. The changes thus made in the nature of the right will necessarily affect other rights, when they come into competition with it. Several of the most important of these indirect effects of registration will be considered in the following cases:—

CASE 1. If a lease, not protected by the Act 1449, but valid against the grantor and his heirs, and followed by possession, should come into competition with a subsequent lease which has been recorded, which would be preferable? In this case, the proprietor, not being feudally divested by the first lease, would have a sufficient *title* to grant the second; and the registration of the second would be equivalent to the possession on the first. There would thus, while the grantor or his heirs remained proprietors of the lands, be two equally good leases, each followed by possession. The tenant

under the first lease might plead, that the recent statute does not make a lease a real right on its being recorded, but merely gives it one of the privileges of a real right, viz., validity against singular successors,—that section 16 gives to registration the effect which would have followed from possession at that its date, but no more,—that the effect of prior possession must be held equal to prior registration,—that on the lands passing to a singular successor, the holder of the recorded lease may derive advantage from registration, not till then. The holder of the recorded lease, on the other hand, might plead,—that the proprietor of the lands having, at the time granting that lease, a perfect feudal right, unburdened with any encumbrances protected by the statute of 1449, his lease was a good title to the lands, and that registration completed his right, making it a real burden on the lands,—that his tenant-right was as valid as the right of property in a disponee infest, and that, in respect of it, he was a singular successor, not bound to recognise the former lease,—that his right being, by this statute, effectual against a prior disponee without infestment subsequent to the date of the registration of the lease, it must be equally effectual against one holding an inferior and personal right, such as a lease unprotected by the Act 1449. We are inclined to think, that the argument of the tenant under the prior unrecorded lease should prevail. The statute should not be extended beyond its terms, and, according to these, it does no more than make certain leases permanent and binding on successors who do not represent the granter. We are not to infer, that because these leases are made effectual against singular successors, they must be held to be real rights, and so effectual as real rights against all and sundry. The construction which long custom has put on the Act 1449, cannot be applied to the terms of a new Act. We think, therefore, that while the lands let remain with the granter and his heirs, both leases should be regarded as personal contracts, and that on the principle, *unusquisque debet scire conditionem ejus cum quo contrahit*, the second lessee must be postponed to the first. If the second lessee knows of the prior lease when he obtains the second, he will be implicated in the fraud of granting double rights, and so barred from taking advantage of his own wrongful act, whether his lease is held to be a real right or not.

If the prior tenant's possession were interrupted for an instant after the registration of the second lease, his right would be at that moment cut off by it, in consequence of the statutory possession which would then commence.

The position of the prior tenant, in this case, would be the same whether his lease were registerable or not. Whether or not he ought to register after the second lease has been recorded, is a question of some moment, and of great difficulty. On this point, the distinction made by the statute between the preferences of leases executed before its date and those executed after, bears materially. In leases dated before the Act, the date of recording does not

directly regulate preferences, though it may do so indirectly in some cases, in so far as it has the effect of possession in completing rights. In leases dated after the Act, the date of registration does regulate preferences.

The question may thus arise in three forms: 1. When both leases are dated before the Act. 2. When both are dated after the Act. 3. When one is dated before the Act, and the other after. We shall consider them separately.

CASE 2. Assuming that the tenant under the unrecorded lease, in Case 1, has a valid lease during the proprietorship of the grantor and his heirs against the holder of the recorded lease, what would be the effect of his recording his lease while it continues valid, but after the second lease has been recorded, supposing both leases to have been executed before the date of the Act? This case does not present much difficulty. The present statute would prolong the now recorded lease of the prior tenant against singular successors. His statutory possession, arising from registration, would emerge at the moment when the right to the lands passed to the singular successor, so that his possession under his lease would never be interrupted. The holder of the second lease could plead no preference on account of prior registration, because the statute gives none among recorded leases executed before its date. His strongest plea would seem to be, that he having, as well as the prior tenant, a lease which registration or statutory possession might render complete against singular successors, his statutory possession emerged, and his right became complete when the lands passed to the singular successor, and that he had a *pari passu* right to possess the lands with the other tenant from that date. To this it might be answered, that the whole possession under the first lease must be taken together; and that even were it otherwise, the second tenant's lease ceased to be valid *as a lease*, even against the grantor, at the moment when the lands passed to the singular successor, so that his imperfect right ceased before it could be completed.

CASE 3. Taking the same circumstances; with this exception, that the leases are both dated after the Act, what would be the effect of the first tenant's registration? The first lease would, while unrecorded, be valid against the holder of the recorded lease, while the lands remained with the grantor or his heirs; but on registration it would seem to come under the absolute terms of sect. 12 of the new Act, which declares, that "all such leases executed after the passing of this Act, and all assignments, designations in security, of any such lease recorded as aforesaid, and translations thereof, and all adjudications of such leases recorded as aforesaid, or assignments in security, shall in competition be preferable according to their dates of recording;" so that it would be postponed in competition to the first recorded lease. It may be a strange result that a lease should be in a worse position from having been registered, but it seems to be impossible to get over the words of this clause. There is no

hardship in the case; for if a lessee voluntarily changes the nature of his right, he has himself to blame.

CASE 4. Assuming that the first lease on which possession has followed is dated before the Act, and that it has been recorded some time after the registration of the second lease, and that the second lease is dated after the Act, how will the preference be regulated? The competing leases in this case would be neither leases dated before the Act, nor leases dated after. On the one hand, it might be said that the statute intending to protect current leases on their registration against preferences arising from mere priority of registration, the clause must be construed in favour of the tenant under the first lease. On the other hand, it might be said that the statute intended that future leases should be protected by registration from everything entering the register of a later date. It is easy to suppose cases where a third party, contracting on the faith of the register, would be injured, were the tenant in possession to be preferred. Still, it is by no means clear that sect. 12 does more than regulate competitions between future deeds.

CASE 5. A lease protected by the Act 1449, *unrecorded*, will be valid as a real right against all future leases, whether recorded or not. The only difficulty in this case arises when a lease so valid as a real right under the Act 1449, has been executed after the passing of the Registration Act, and is registerable. The question then is, whether it comes under the declaration in sect. 12 of the new Act, that "all such leases executed after the passing of this Act, etc., shall in competition be preferable according to their dates of recording." We have in last article (see February No., p. 65) given our reasons for holding that this clause applies only to recorded leases. We would only add here, that if we trace back the expression, "such leases," to the immediately preceding section, we find it used as clearly applicable to recorded leases only. As there may, however, be a doubt about the matter, it may be safer either to register the lease, or to make it unregistrable by avoiding some one of the requisites mentioned in sect. 18. Thus, if the lease is not of burgage property, by carefully omitting the name of the lands or their extent. There may be more difficulty with a lease of burgage subjects, as the statute seems to have exempted them from these requirements. At all events, leases of burgage subjects, as well as all other leases, may be kept from being registerable by not being made probative. It might even be competent to make a probative lease improbative, provided this were done before any other lease has been registered; after that, it might be held to be fraudulent. This last remedy is not to be recommended, as there might be some difficulty in proving that the lease had been made improbative at a time when it was lawful to do so.

CASE 6. If a lease protected by the Act 1449, and recorded, came into competition with a subsequent lease recorded of an earlier date, there might be difficulty in deciding whether sect. 12 of the

statute would not postpone the first lease as a recorded lease to the first recorded lease, supposing both leases to have been executed after the date of the Act. This case is similar to Case 3, but we think it would be decided differently. If the first lease under the Act 1449 is to be held to be a real right, it must have feudally divested the proprietor of the right of occupancy granted by the lease; the second lease or grant of occupancy would therefore proceed *a non domino*, and would be ineffectual as a lease during the subsistence of the first. The second lease would during that period be no better than a lease from a person who was not at the time proprietor of the lands, and could no more be benefited by registration than such a lease. It could not, therefore, come into competition with the first lease. It may be said, however, that the Act 1449 does not make leases real rights any more than the present Act does so, and that both give validity against singular successors, but nothing else. If both Acts had been passed at the same time, the argument would be unanswerable; but the old Act has become so incrustured with decisions, that we cannot now look at its naked terms. In the case of *Brock v. Cabbell*, 5th March 1830, 8 Sh. 652, Lord Fullerton observed, "Although a lease of lands be like any other contract of location, in itself personal, yet it has become, in virtue of the statute 1449, a real right—a character uniformly assigned to it by our institutional writers, and confirmed by a series of decisions which it is impossible now to disturb." The majority of the Court were of the same opinion. For these reasons, it is probable that the tenant in possession under the first lease would be held to have had a right valid as a real burden on the lands, from the time when he entered into possession; so that the second lease granted by the proprietor would be ineffectual, though registered, as proceeding from one feudally divested.

IV. BOND AND ASSIGNATION IN SECURITY.

The Act creates this new species of heritable security. Section 4 makes it lawful for any party having right to a recorded lease, and whose right has been recorded, to assign the same, in whole or in part, in security for the payment of borrowed money, or of annuities, or of provisions to wives or children, or in security of cash credits, or other legal debt or obligation, in the form of a schedule appended to the Act. The assignation must be made in accordance with the conditions and stipulations of the lease, and not otherwise. The right of the creditor is completed by recording the deed, and it is declared that the assignation in security so recorded shall constitute a real security over the lease to the extent assigned.

An assignation in security may be transferred by a translation in the form appended to the Act, the registration of which completes the title of the party in whose favour it is granted.

Provision is made for the creditor's entry into possession in de-

fault of payment as follows: "The creditor or party in right of such assignation in security, without prejudice to the exercise of any power of sale therein contained, shall be entitled, in default of payment of the capital sum for which such assignation in security has been granted, or of a term's interest thereof, or of a term's annuity, for six months after such capital sum or term's interest or annuity shall have fallen due, to apply to the sheriff for a warrant to enter on possession of the lands and heritages leased; and the sheriff, after intimation to the lessee for the time being, and to the landlord, shall, if he see cause, grant such warrant, which shall be a sufficient title for such creditor or party to enter into possession of such lands and heritages, and to uplift the rents from any sub-tenants therein, and to sub-let the same, as freely and to the like effect as the lessee might have done." It is provided that no creditor or party, unless and until he enter into possession, shall be personally liable to the landlord in any of the obligations and prestations of the lease. The assignation in security contains a power of sale, and sect. 20 enacts that the procedure to be followed in carrying it into execution shall be that prescribed by 10 and 11 Vict. cap. 50, for a sale under a bond and disposition in security.

V. TRANSMISSION OF LEASE RIGHTS.

I. TO ASSIGNEES.

1. *When lease and title of cedent are both recorded.*—A recorded lease may under sect. 4 be assigned in whole or in part by any party having right to it, whose right has been recorded in terms of the Act. The assignation must be in accordance with the conditions and stipulations of the lease, and not otherwise, and without prejudice to the right of hypothec, or other rights of the landlord. The recording of the assignation is declared to vest the assignee with the right of the granter thereof in and to the lease, to the extent assigned. The assignee's title is thus at once completed.

2. *When the lease has not been recorded.*—The case of an assignee to an unrecorded lease comes under sect. 5, which provides for the recording of leases, "where the party in right of any such lease is not the original lessee." By means of it the assignee can get the lease put on record. To do this, he must obtain a notarial instrument, setting forth his title to the lease as assignee; and the keeper of the register, on such notarial instrument being produced, is required to register both the lease and the instrument.

It is to be observed that this section does not declare that the recording of the lease and instrument shall complete the assignee's title. It only sets forth the procedure as a competent mode of getting a lease put on record, at the instance of a party not the lessee.

The notarial instrument appears on the record only as the warrant for registration. It is true that the assignee must have satisfied the notary of his right by producing the assignation before he could get the instrument, and that the name of the assignee appears upon the register as the party having right to the lease, so that the public get due intimation; but this may not of itself be sufficient. In the case provided for by sect. 9, where an assignee to a recorded lease has died before recording his assignation, his heir must complete his title by getting a notarial instrument, which in the form prescribed sets forth his title to the lease by service as heir of the assignee. The recording of this instrument, though it both shows that the notary has examined his right, and brings his name upon the register, is not sufficient, for the Act requires the assignation as well as the instrument to be put on record. This being the case, we think the assignation should be recorded in the present case also.

3. *When a lease has been recorded, but not the cedent's right.*—In this case, if the cedent can be got to complete his title, the assignee may afterwards complete his own by recording his assignation.

If the cedent refuses to complete his title, the assignee must adjudge in implement against the party appearing on the register in right of the lease, or his heir if he is dead. The adjudication would proceed on the conveyance of the personal right in favour of the cedent, and the assignation granted by him to the adjudger. In the case of the adjudication proceeding against the heir of the party on the register, a decree of constitution would first have to be obtained, unless he had served or otherwise represented the ancestor. The recording of the abbreviate of adjudication would then, by sect. 10, complete the assignee's title to the lease.

If the cedent is dead, the assignee cannot record the assignation in favour of his author under sect. 5; for that section only provides for the case of a third party having acquired right to a *lease or assignation in security*, and not to an assignation.

Neither can he do it under sect. 9; for while it provides a notarial instrument for the cases of an *heir* and *general disponee* having right to an assignation in favour of a party deceased, it makes no provision for the case of a second assignee having right to such unrecorded assignation, and makes it unlawful for the keeper of the register to record an assignation in favour of a party deceased, without such instrument being produced. It would be competent for the heir of the last cedent to record the assignation in favour of his ancestor in terms of this section; but this would not complete the title of his ancestor, but his own. The completion of the heir's title would not accrete to the assignation granted by the ancestor. (See *Keith v. Grant*, 14th Nov. 1792, M. 2933; *Martin v. Wight*, 3d Feb. 1841, 3 D. 485; *Menzies's Lectures on Conveyancing*, p. 630.) The assignation by the ancestor would still remain, as regards feudal efficacy, a grant *a non domino*, and the second assignee could not complete his title by means of it. He might now, however, ob-

tain a new assignation from the heir of the cedent, the recording of which would at once complete his right. If the heir refused to assign after having completed his title, the assignee might at once raise an adjudication in implement against him as representing his ancestor, and complete his right by recording the abbreviate.

If the heir of the cedent refuses to make up his title, the same course may be followed as in the case of the cedent himself refusing to complete his title, viz.—adjudication in implement against the party appearing on the register as in right of the lease, or his heir.

(To be continued.)

THE STAMP LAWS.

DO LATTER WILLS AND TESTAMENTS REQUIRE TO BE STAMPED ?

WHENCE arise those numerous popular errors in law, which so frequently require either judicial correction or legislative interference ? Fallacies, in themselves transparent, take hold of the public mind, and are suffered to spread unchecked, till their very prevalence secures them from controversy. Of this kind is the well-known delusion, that every thriftless heir is at least entitled to be “cut off with a shilling;” and many other errors prevail, not less deeply rooted, which, on examination, will be found to rest on grounds scarcely less shadowy. One of these we shall endeavour to expose in this article; but our opinion is so totally opposed to the current practice, that we are far from supposing that it will obtain immediate, still less universal, assent.

It is a very generally received opinion amongst all grades of the profession, that latter wills and testaments are privileged above all deeds, so as to be exempt from stamp duty. When authority is asked for the exemption, reference is never made to the statute itself, but solely to the professional practice; so that the reasoning is simply, that they are not subject to stamp duty because they are generally executed without stamp; or, in other words, evasion of the law is the best evidence of its non-existence.

The practice, however, must be one of some doubt, when the fact is known that in some counties, whenever the objection has been taken to this class of deeds as unstamped, it has been sustained by different sheriffs, including, we believe, such high authorities as Sheriffs McNeill, Whigham, Anderson, Crawford, and Mure.

The system of our stamp laws has gradually grown up, and now forms no unimportant branch of our jurisprudence. Originating and maintained chiefly for purposes of revenue, it has subserved more important ends. Stamps are a mode of raising money for the Crown, which satisfies all the requirements of a good tax. The cost of collection is small, and the payment is cheerfully made. But beyond this, stamped paper has served another purpose. The effigies of the Crown has invested the deed with a solemnity, which

has the double effect of making men more cautious of lending their names to it, and of adding to the sacredness of the obligation when it is incurred. In many cases has the stamp been the instrument of detecting fraud, by reason of the date of the issue contradicting the date assumed. In no class of cases is this element of greater importance than in the latter will and testament.

The germ of the stamp laws is the 22 and 23 Charles II., c. 9 (1671), whereby duties were imposed on grants, but which were collected by officers of court and receivers in different departments. The first direct Stamp Act is the 5 William and Mary, c. 21 (1694). This Act was followed by a series of statutes, increasing and extending the duties. A peculiarity in this progress of legislative enactments was, that each new duty required a new or additional stamp or die; so that in ancient titles will be found a mosaic congeries of sums, which, when added together, gives the sum of the cumulo duty exigible at the time under various existing statutes.

In 1804 all the existing duties were repealed, and a consolidated or general Act passed, being the 44 Geo. III., c. 98. This, in like manner, was succeeded by the 48 Geo. III., c. 149, and by the 55 Geo. III., c. 184, which is the present general Act, modified, however, by numerous successive Acts for particular purposes, especially 9 Geo. IV., c. 49, and 13 and 14 Vict., c. 97. Although the duties in former Acts are repealed, the statutes themselves are not so, but are expressly continued as to the mode of securing and managing the duties. It becomes, therefore, often necessary to read the whole series of statutes to discover the law on some general question, apart from the amount of duty.

As revenue and taxing statutes, the stamp laws must be read with strictness as matter altogether of positive law. But, of course, the enacting words must be read without violence, and according to the usual rules for interpretation of statute law, and the usual and ordinary signification given to language. Mr Tilsley, the latest and best authority on this branch of law (p. 4), lays it down as "incumbent on the party who seeks to charge an instrument with duty, to show clearly that it is *within* the Act; but this distinction is to be borne in mind, that where an instrument is *prima facie* *within* the charge, it lies on the party contending for an exemption to show that the instrument is *included* in it."

There is every presumption for freedom of transference of property, and unfettered commerce in land and money; but wherever there are express taxing terms, these cannot be set aside or superseded by any practice, however long standing and extensive. It is unfair to place the burden on any class of deeds and persons, and permit others equally within the scope and terms of the law to go free of the like burden.

At the threshold of the inquiry, whether latter wills and testaments require a stamp, we are met with the anomaly, that whilst the transference of heritage, though it be only a pendicle in a remote

clachen, with "butt and ben" and "back and fore," must have a stamp corresponding with the price or value if a sale, and impressed with a deed stamp if it be a simple conveyance, either *inter vivos* or *mortis causa*; yet the millionaire, it is thought by some, may pass his untold hordes of gold to his kindred, or, as is often the case, convey them from them, without even the requisite of an ordinary deed stamp.

Turning, then, to the schedules annexed to the Act 55 Geo. III., c. 184 (1812), which give the *general* rule, unaffected by any posterior and *special* statutes, the following instruments will be found in the schedule as subject to a uniform stamp duty of £1, 15s. :—

ASSIGNATION or ASSIGNMENT of <i>any</i> property, real or <i>personal</i> , heritable or <i>moveable</i> , not otherwise charged in this schedule, <i>nor expressly exempted from ALL stamp duty</i> ,	L.1 15 0
CONVEYANCE of <i>any kind whatsoever</i> , not otherwise charged in this schedule, <i>nor expressly exempted from ALL stamp duty</i> ,	L.1 15 0
DISPOSITION of <i>any</i> land or <i>other property</i> , heritable or <i>moveable</i> , in Scotland, or of <i>any</i> right or interest therein, not otherwise charged in this schedule,	L.1 15 0
DEED of <i>any kind whatever</i> , not otherwise charged in this schedule, <i>nor expressly exempted from ALL stamp duty</i> ,	L.1 15 0

Mr Tilsley, in treating of the common deed stamp duty, observes (p. 386) :—"It seems to be an amount intended to be charged on *every* instrument upon which no specific duty is imposed." "The various descriptions above extracted manifest an anxiety that no instrument *operating in any way* as a transfer of property, or of any interest therein, should escape taxation."

It is thought that these various clauses of the statute clearly embrace a last will and testament of moveables. If it be of any avail, it must assuredly fall within such comprehensive words as Assignment, Conveyance, Disposition, or Deed of any kind whatever. If it be not one or other of these kinds, it will indeed be a problem to designate it under any other known name of legal writs. The onus is, therefore, fairly shifted on those who maintain the validity of the existing practice, to point out the exemption under which this instrument is said to fall.

It is believed that the source of the error can be ascertained. There is at the end of the *general* schedule, "General exemptions from all stamp duties," so often referred to in the quotations above given. The exemption of wills and testaments will be searched for in vain in this quarter. The class so exempted preclude the notion that the transference of moveable property was to be dealt with so liberally. The exemption is confined to paupers, poor prisoners, charities, and small debt proceedings at law, by a monstrous policy, at a time when justice was taxed by stamps on procedure in courts of law.

Besides the general, there are *special* exemptions under particular schedules. Such is the clause "*Settlement*," obviously referring to

an English deed, unknown in Scotch practice, and which is expressed in language wholly unknown to Scotch lawyers. Under this clause there are some exemptions thus introduced:—"Exemptions from the preceding *ad valorem* duties on settlements." Under this heading or rubric are stated "wills, testaments, and testamentary instruments, and dispositions *mortis causa*, of every description." It is to be feared that the profession, in their haste, and perhaps "the wish being the father of the thought," have fixed their eyes on these words without the trouble of observing under what heading they range, and have read a special exemption from a particular *ad valorem* duty, as a general exemption from *all* stamp duty. The necessity of exemption from the accumulating *ad valorem* duty, is at once proof that the deeds so exempted were otherwise subject to simple duty; otherwise the statute is made to discourse nonsense. If subject only to the ordinary duty, it was proper to exempt from the extraordinary duty; but it would be absurd to declare deeds subject to no duty as exempted from cumulative duty. It would be as if a statutory declaration, to the effect that an excise article was free from *extra* duty, thereby virtually declared its non-liability to ordinary duty. If anything was needed to confirm this view, it will be found by the previous sections of exemptions, which free from *ad valorem* duties all instruments *supplementary* to settlements, deeds, or wills; which would, according to those opposed to our view, infer, that whilst the original deed is free from all duty whatever, the supplementary writ is only liberated from *ad valorem* duty. In fact, the words prove too much, because they plainly include all settlements or *mortis causa* deeds, alike of heritage as of moveables. The advocates for exemption of all wills of moveables to *whatever extent*, however great, will scarcely hazard the experiment of dealing in like manner with a *mortis causa* settlement of heritage to any extent, however small.

Some practitioners who have come to doubt the application of the exemption under the head of *settlement*, have sought to avoid the difficulty by executing testaments without a clause of registration, and thereby maintaining that the writing no longer had the characteristic of a deed. This is a novel and startling doctrine. The clause of registration is no part of the *essentials* of a deed, but merely the foundation for obtaining the benefit of the Records, either for preservation, publication, or diligence. It is the *deed* or *act* of the maker which gives validity to the ancillary clause of registration, and not that clause which confers the sanction of deed on the will of the granter. Professor Menzies, in his Lectures, has well observed:—"The testing clause is in reality the only part which is common to all deeds, and which gives to every instrument the character of a solemn deed." Mr Tilsley in like manner observes:—"Delivery is of course essential to constitute a deed, but no particular form of words is necessary, either written or oral."

In support of the plea that, stript of the registration clause, a deed is no longer a deed, reference has sometimes been made to the

General Stamp Act, where, under the head of Agreement, a stamp of L.1 was required for agreements in Scotland without any clause of registration, and where the matter of value was above L.20. But, in the first place, there exists no analogy between *mortis causa* deeds and agreements *inter vivos*; in the next place, last wills and testaments are common to Great Britain, but the agreement above dealt with was peculiar to Scotland; and, in the last place, there was the more important element of value, so that above the stipulated L.20 the duty was exigible, whether there was or was not a registration clause. Even this plea from analogy no longer exists, since, under recent Acts, all agreements, of whatever value, are now required to be put on half-crown stamps.

It is understood that, recently, on an application from Dundee, the Commissioners of Inland Revenue have stamped a testament of moveables having a clause of registration, as "*free from stamp duty*." If this be the fact, they have traversed the often-repeated opinion of their officials of former times.

The Act 17 and 18 Vict., c. 83, sect. 17, on the express reason, "*to prevent fraud and evasion of stamp duty*," confers on the Commissioners power, on *special* application, supported by affidavits if required, to "*determine what is the proper duty for any particular instrument as to which there may exist doubt, or to declare that it is not liable to any stamp duty*." The Legislature has given no power to the Commissioners to repeal, modify, or extend the terms of the statutes. The interpretation of the Acts of the Legislature rests solely with the courts of law, and it would be at once unconstitutional and highly dangerous to confer this power on the Commissioners. Their *fiat*, as to any *particular* deed or instrument as to which there may exist doubt, may be final, under the statute, *as to that particular writ*. But certainly it can never be held to fetter the ordinary tribunals of the land from exercising their judicial functions, whenever objection is taken as to any other deed of the same class. If the act of the Commissioners *exempting* a deed from duty is to be conclusive, then equally must it be so with their declared opinion that other writs are *subject* to stamp duty. In this way, not merely would the judiciary of the country be superseded, but the *legislative* power, in a matter the most delicate, and forming the boasted prerogative of the faithful Commons, would be transferred to a Board of Commissioners, the nominees of the Crown. In the words of Mr Tilsley, "The Legislature has not thought proper to invest the Commissioners with authority to decide any question relating to stamp duties, nor by any act of theirs (excepting in the instance of denoting stamps in *particular* cases, specially provided for) to preclude inquiry as to the sufficiency of the stamp of every instrument." And in England, the courts are not in the habit of referring to the Stamp Office on any question before them. Numerous instances are to be found where the Commissioners had mistaken their duty, and affixed an improper stamp, and that even on

a penalty. One case could be mentioned, where a lease was three consecutive times successfully objected to in a Sheriff Court as inadequately stamped, and on every occasion the Stamp Office admitted their error, and affixed the additional corrective stamp.

The error is attended with serious consequences. The penalty of L.10, with the heavy expenses of London agency, is somewhat heavy on a small succession to be divided amongst poor relatives, and which may ultimately fall wholly on some reversionary legatee least able to bear it. In such cases, the claim of relief against the agent who omitted compliance with the law appears clear.

It is doubtful if such unstamped deeds can be received by the keeper of any register; and if received, and the objection under the stamp laws taken and sustained, an application to the Supreme Court would become necessary to obtain its transmission to the Stamp Office. All these considerations are in favour of the more prudent view which we recommend.

It has been hinted as a reason for the exemption of latter wills from stamp duty, that they are often executed in haste on death-beds, in distant parts of the country where stamps are not to be got. The answers are manifold. In the first place, such delay in putting one's house in order, until the time when the person should turn his face to the wall, is to be discouraged, rather than thus so highly favoured. In the next place, such reasoning is not admitted with respect to any other class of deeds. In the much less important class of bills, a party gave a bill on unstamped paper, binding himself to grant a stamp bill, and stating as the reason for not doing so at the time, that he was distant from a stamp office. The Court, of course, disregarded the apology. If good for one class of deeds, it is good for all. Lastly, if any such emergency should occur, which is extremely unlikely, there is a period allowed, within which the deed may be stamped without penalty, and at any time it can be stamped on payment of penalty. The argument, therefore, comes to this, that because there may be one case in a thousand in which there exists hardship, therefore the 999 must enjoy the like immunity. All laws are made to reach the public in general, and no law was ever passed which did not create exceptional cases of hardship; but these must be endured, for the general good of the public.

Finally, it may be doubted, in more respects than one, whether this is the class of deeds which ought to be so highly favoured, and the only writs of importance which escape the meshes of the net of the stamp laws. They are, generally speaking, of all deeds those most likely to bear the duty. If septagenarian and octogenarian uncles and aunts, whom the law now kindly encourages in the sport of *will making* and *unmaking*, knew that every act of diversion in this line was taxed, they would be more serious in the making, and still more so in cancelling their made deeds. There would not be such a *plethora* of holograph wills and codicils, so well calculated to set relatives by the ears, and to form the foun-

dation of much litigation. If the possessors of money knew that a stamped deed was *necessary* for the right settlement of their worldly affairs, they would seek the counsel and help of their law agent to put their wish and will in proper legal shape; and whilst the gain to the public revenue would not be small, the saving of expense of litigation would be great. "Every man his own lawyer," is never worse applied than when he becomes the fabricator of his own testament. If "the man who is his own agent has a fool for his client," the man who is his own testament-maker is still further gone in folly. In the former case, a change of agency may extricate the fool from the ditch into which he may have fallen; but when the grave has closed over the testator, there is no remedy or mode of extricating the difficulties which beset the crude and chaotic mass of words in which the deceased has in vain attempted to express his intentions.

REVIEW IN CRIMINAL CASES.

THE High Court of Justiciary is one of those old institutions on which time, the great innovator, has wrought little or no change. Its ancient dignity stands unimpaired, on the same footing on which, two centuries ago, it was first established. Others of the Scotch courts have, in that interval, passed away; others have been so greatly modified, as now to bear few traces of their original features. But, all the changes of the present century, have left untouched the Supreme Tribunal, to which are committed the lives and liberties of our fellow-subjects. We have still the public prosecutor for the public interest,—the indictment in the old form of the syllogism,—the debate on the relevancy, if exception can be taken to law derived from the narrow expressions of no statute, but based on an elastic consuetudinary code. The mode of summoning and selecting the jury are the only points on which it has been found necessary to harmonise our criminal practice with the spirit of the times; and this was effected by the 6 Geo. IV., c. 22. This statute excepted, experience has shown that, with all the advanced views of the present day, the forms of our criminal process are so near perfection, as to be almost incapable of improvement. We have no wish that the unchanged features of the High Court should in any way be disturbed; but there are certain particulars in which the benefits of its jurisdiction might be advantageously extended. In the first place, we think an appeal should lie to the High Court against the law laid down by the judges on circuit; and, in the second place, means should be taken for cheapening and simplifying that branch of its jurisdiction which it now exercises as a court of review, over the judgments of police, sheriff, and other inferior courts.

Our first proposal relates to a defect in our criminal jurisprudence,

shown that this privilege is not one likely to be abused, because rarely is the right taken advantage of, unless there is some serious and tenable ground of complaint. But indirectly a review operates to the advantage of the public in various respects far more important than the individual concerns of the party more immediately interested. It would be an act of great justice to the judge, who would be relieved of an undue responsibility. Moreover, a right of appeal acts as a check on the judge—prevents the exhibition of caprice and prejudice—and saves him from deciding with undue haste and precipitation. But, more than that. It would secure throughout the country that perfect uniformity which is the first object of every system of jurisprudence. Law should not be one thing in one country and another in another. It is well known how the ruling of one judge on circuit has been refused as heterodox by his brother elsewhere. Every attempt should be made to avoid falling into the position of France before the Revolution of 1789, when the place and not the person made the law. And yet, as matters go, if we allow two judges, or perhaps one judge, to be *solus et conditor et interpretis legis*, where his determinations regarding the lives and liberties of his fellow-subjects vary with the associations of the place, or are affected by temper, or regulated by the time, we do everything we can to encourage precisely the state of things which all human experience has condemned. All these evils would be avoided by the adoption of the remedy which Lord Cockburn proposed. It would be simple, expeditious, inexpensive, and liable to no conceivable kind of abuse; and we hope, ere long, to see it introduced as an important feature of our criminal jurisprudence.

II. The High Court of Justiciary, as the supreme criminal tribunal in the country, has the power of giving redress against the judgments of all inferior magistrates, when these are contrary to law, or the proceedings are informal or irregular. This power of reviewing inferior court sentences is by means of a Bill of Suspension setting forth the facts, and praying that the sentence complained of may be set aside and suspended. The procedure is as follows:—A warrant is granted by any one of their Lordships for serving the suspension on the respondent, who gives in answers either in the form of a continuous or articulate statement of the facts. On the matters thus put in issue by the parties the case is argued and determined. The procedure has the merit of being simple and expeditious, but, unfortunately, at every step of the process, certain fees are exacted by the officials, which swell the preliminary expenses to an amount far beyond the means of most poor men. This is the last relic which remains of the old obnoxious system of maintaining the machinery of courts of justice by taxing the suitors. These impositions have been denounced by Bentham in that famous Protest¹ which has been de-

¹ A Protest against Law Taxes, showing the Peculiar Mischievousness of all such Impositions. By Jeremy Bentham. Second Edition. London: Ridgway, 1853.

scribed by Lord Brougham as "the greatest monument even of his great fame as a lawgiver and jurisconsult." In this tractate he shows most conclusively that a tax on justice is the worst of all possible forms of taxation. It is iniquitous from its subject-matter, because justice is the "security which the law provides us with for everything we value—for property, for liberty, for honour, for life." It is iniquitous too from the class on which it chiefly falls, because it is the poor who are despoiled in this way of the protection of the law. "The rich (he says) have their shields to ward off the attacks of injury—the natural influence of wealth—the influence of situation—the power of connection—the advantages of education and intelligence. But the poor has but one stronghold, the protection of the law, and out of this the financier drives him, without vouchsafing a thought, in company with a herd of malefactors." Moreover, all such imposts are objectionable, because, in effect, they sacrifice the poor to the wealthy, by tending to discourage the honest litigant; and their imposition is a denial of justice equivalent to outlawry to those who cannot pay. Their supposed discouragement of litigation is a fallacy which it is now needless to expose. In short, view this question from whatever point we may, the observation of Bentham seems justified—"It is a common remark that he who objects to a tax is bound to propose a better. I admit the principle, and I willingly accept the condition. My answer is—in substitution of *law taxes* impose any other tax that the wit of man can conceive."

We would then begin our reform by the abolition of the extravagant fees which now form so great an obstacle to the equitable jurisdiction of the High Court, in controlling the proceedings of inferior judges. The iniquity practised in some of the subordinate criminal courts is matter of daily observation. Sheriffs themselves sometimes go wrong—especially in matters of evidence; but the specimens we occasionally see of the absurdities of the unpaid magistracy,¹ make it especially desirable that the access to the Court of Appeal should now be cleared of all obstructions. The ferocity of justices of the peace against poachers and the like, may be fitly placed in the same category with the oppression every day practised in our Police Courts by those enlightened tradesmen and shopkeepers who, elevated to the possession of a little brief authority, are such brilliant examples of the dignity of British law. All these accomplished amateurs must, sooner or later, be removed from a position, for which they are so ill fitted by education, intelligence, and previous habits; and, armed with the powers which they now so unworthily exercise, we must have men who make the law the study and business of their lives, and who are specially trained for its administration, just as the very same persons who figure as bailiffs require that their humblest clerk or shopman should have some knowledge of the business in which he seeks employment.

¹ See *Gray v. McGill*—High Court—March; and the Justiciary Reports *passim*.

But, till stipendiary magistrates are general throughout the country, the only remedy of the public against the fantastic exhibitions of police magistrates and justices of the peace is a ready appeal to the High Court.

In furtherance of this object, we venture to suggest an amendment on the form in which the case is now brought before the court. The system of statement and answer frequently does not bring the parties to a definite and intelligible issue. Facts are not set forth with sufficient precision, because every suitor is naturally prone to place his case on as broad a basis as possible, so as to meet all contingencies. The Court, therefore, has sometimes to order further information, and often inquiry. Now, the proper province of a Court of Criminal Appeal should be exclusively confined to matters of law. The judgment of the inferior Court on the facts on which the question arises is held conclusive, like the verdict of a jury in similar circumstances. Therefore, all the Court requires is an authoritative statement of the facts on which the judgment complained of was pronounced. It appears to us that the best form in which this could be done is in the form of a case, and the party best qualified and to be most trusted in its preparation, is the judge himself.

This way of bringing matters under appeal is no new crotchet. The system has been in operation in England, in the County Courts, in the Court of Criminal Appeal; and so successful has it proved, that, last session, the same form of review was extended to courts held by justices of the peace. The adoption of the same practice would therefore be no innovation, which has not been fully tried and tested. We may add, by way of parenthesis, that our proposal would quite carry out what is now generally admitted to be the true policy of the legal profession,—viz., to increase the legal business of the country, by diminishing its cost, by abolishing useless steps of the procedure, and by making the time between the commencement of a case and final judgment as short as possible. Every day one is more and more struck with the fact that the profitable practice of the profession depends, not on the *length*, but the *number* of the cases of a practitioner.

In room, then, of the bill of suspension and answers, and the fees chargeable thereon, we propose the extension to Scotland of an act passed last session, which is now operating most successfully both in England and Ireland. It is the 20 and 21 Vict., c. 43,—an act to improve the administration of the law, so far as respects summary proceedings before justices of the peace. It provides that, within three days after the hearing and determination by justices of the peace, of any information or complaint, either party to the proceeding may apply in writing to the justices to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior Courts of Common Law, to be named by the party applying; and such party, thenceforward

called the "appellant," must, in three days after receiving the case, transmit the same to the court named in his application,—first giving notice in writing of such appeal, with a copy of the case so stated and signed to the other party, thenceforward called the "respondent." The appellant, at the time of making the application, must give security for the costs—a provision which obviously prevents frivolous applications; but the justices are specially empowered to refuse to state a case, if they think the application frivolous,—in which event the remedy is to apply to the Court of Queen's Bench for a rule, requiring a case to be stated. The Court may also send the case back for amendment, if the statement is incorrect or defective. The Court is then empowered to hear and determine the question or questions of law arising on the facts set forth, to reverse, affirm, or amend, or remit the case to the magistrates, with directions how to proceed. The procedure thus combines the advantages of being at once simple and expeditious. A still further merit is that it is comparatively inexpensive. The following is the schedule appended to the act :—

FEES TO BE TAKEN BY CLERKS TO JUSTICES.

For drawing case and copy, where the case does not exceed five folios, of ninety words each, - - - - -	10s.
For every additional folio, - - - - -	1s.
For the recognisance, to be taken in pursuance of the act, - - -	5s.
For every enlargement or renewal thereof, - - - - -	2s. 6d.
For certificate of refusal of case, - - - - -	2s.

This act should be extended to Scotland, and made to apply to all inferior jurisdictions, to proceedings in criminal matters before sheriffs, baillies of burghs, magistrates in Police Courts, and justices of the peace. Parties would thus be able to obtain redress in the High Court, at a vast saving of time, and a still greater saving of expense, and the profession would be more remunerated for the sacrifices they would make in the matter of costs, by the large increase in this branch of business, which would be the result.

Review.

THE NEW MINISTRY.

So far as the profession of the law is concerned, the following are the results of the change of Ministry :—

SCOTLAND.

Lord Advocate.—John Inglis (passed advocate 1835), in room of James Moncrieff (1833).

Solicitor-General.—C. Baillie (1830), in room of E. F. Maitland (1831).

Advocates' Depute.—E. S. Gordon (1835), in room of A. R. Clark (1849); Brown (1838), in room of D. Mackenzie (1842); J. Millar (1842), in room of Hector (1837); Blackburn (1846), in room of Heriot (1839).

Advocate Depute for Sheriff Courts.—R. Montgomerie (1852), in room of W. Ivory (1849).

Crown Agent.—H. M. Inglis, W.S., in room of J. C. Brodie, W.S. *Counsel for Woods and Forests*.—A. T. Boyle (1843), in room of C. F. Shand (1834).

Counsel for Officers of State.—C. Robertson (1834), in room of W. Ivory (1849).

Counsel for Inland Revenue.—P. Fraser (1843),

Sheriff of Stirling.—Moir (1825), in room of Baillie.

Sheriff of Ross and Cromarty.—A. S. Cook (1834), in room of Moir.

ENGLAND.

Lord Chancellor.—Sir F. Thesiger (Lord Chelmsford), in room of Lord Cranworth.

Attorney-General.—Sir Fitzroy Kelly, in room of Sir R. Bethell.

Solicitor-General.—Sir H. Cairns, in room of Sir H. Keating.

IRELAND.

Lord Chancellor.—Napier. *Attorney-General*.—Whiteside. *Solicitor-General*.—Hayes.

These appointments have given general satisfaction. In any view, the most violent partisan must admit that they will bear comparison with the law officers of the late Government. It has been plainly apparent, for many years, that the liberal party, influential as it is in point of numbers, cannot be said to have the monopoly of talent in the Parliament House; and one good result of an occasional shuffle of the political cards, is, that the exigencies of the public service bring to the surface the really able men of all shades of politics. It would be an unfortunate state of things were political

promotion to run without interruption in the same unvaried tract; but recent events show that in the present state of parties, such changes will be by no means unfrequent; and the public service is not likely to suffer from the patronage of the Crown being too long intrusted to the same hands.

The most remarkable feature in the above list is, that it does *not* contain the name of a member of the Conservative party, whose professional position undoubtedly entitled him to the office of Solicitor-General. At the bar, Mr Penney has for many years occupied a position second only to that of the present Lord Advocate; and considerable dissatisfaction has been expressed, that his great professional merits should have been sacrificed to political influence. This is a matter to be settled among themselves, by Mr Penney and his party; and as we know not the secrets of the sect, we cannot tell whether there is anything in his career to justify the treatment he has received. We fear it will be said that he has never given any attention to politics, that his whole time has been occupied by the profitable practice of his profession, and that the patient and laborious cultivation of the legal learning, of which he is so abundantly stored, cannot of itself be taken into account by a party whose first maxim it is, that political virtue cannot, and must not, go unrewarded. However this may be, it is highly satisfactory to find that the silk gown, which Mr Penney should have had, now graces the shoulders of one who, by all parties, is deservedly esteemed for his amiable and courteous bearing, and whose professional reputation must have aided considerably those strong political considerations which told so powerfully in his favour. Of the other appointments we need not speak. The names are all more or less familiar to the profession, and are a fair representation of the rising talent of the Conservative side. The counsel for the Inland Revenue does not go out with the Ministry, the appointment not being conferred by the Lord Advocate.

So far as Parliamentary success is concerned, the Lord Advocate labours under the disadvantage of being too suddenly called to power. He has been most unexpectedly taken from scenes with which he is familiar, and business of which he is a master, to try his powers in a most difficult arena—where the most able Scotch lawyers have proved consummate failures—without any time for preparation, and without, so far as we are aware, the vestige of what can be called a policy. That in time he may be a Parliamentary success, his maiden essay on Mr Dunlop's Valuation Bill, puts beyond question. If he lacks some of those advantages which his predecessor so successfully displays before a popular audience, he excels him in the possession of many of those more solid qualities which should command the respect of a great deliberative assembly. He is not such an adept on the hustings, or in catching the sympathies of a crowd, but the whole

cast of his mind exhibits a massive strength, that were he to act independent of the prejudices of his party, he has now the opportunity of sending his name down to posterity as the author of measures broad and statesmanlike. But if he has ever devoted a thought to what is now needed, he has had no time to consider how the want is to be supplied. Meanwhile, his accession to power has involved large professional sacrifices, for which the Appeal business in the House of Lords will scarcely compensate. We are happy to see that his practice is being taken up by Mr Moncrieff, of whose services in Parliament the country has been temporarily deprived. Thus, the late change in the Ministry has been felt to the two learned gentlemen simply a change of scene, mutually to the benefit, and, we should say, mutually satisfactory to both. The Faculty of Advocates, on the last day of the session, in the most kindly spirit, did all in its power to facilitate the exchange. The anomalous position in which the holders of the silk gowns are placed by a sudden change of Government, has long been the subject of discussion. Accustomed to lead the bar—it may be, as in Mr Moncrieff's case—for no less a period than six years, they are suddenly, by an adverse vote of the House of Commons, reduced again to the ranks, and are forced, by professional etiquette, to act second to members who before were feed as juniors. This was felt to be an injustice, for which some remedy should be devised. It was first proposed that the Crown should be permitted to grant letters of precedence; but the Scotch bar is, it seems, in a different position from the bar of England, being a corporation perfectly independent of both the Crown and the Court; and the members being naturally jealous of State interference with their rights and privileges, rejected the motion. On the present occasion the proposal was repeated in a less objectionable form, and but for the hurried and very irregular manner in which it was brought forward, would doubtless have secured almost general acquiescence. As it was, it was resolved, at a very full meeting, by a majority of about two to one, that the Lord Advocate and the Solicitor-General, on being deprived of their silk gowns, should retain the right to lead—ranking, of course, next after the Dean of Faculty, and their successors in office for the time being. The resolution will obviously operate to the advantage of the public, who will thus be able to command the very best talent which the bar can afford, altogether unrestricted by the former rule, that if an ex-law officer of the Crown was taken as senior, the client must go to the ranks of his juniors in order to procure a second. If the gentleman out of office is not deemed equal to the responsibility, he may be safely passed over; if his assistance is deemed indispensable, the most venerable member may act as his junior.

The temporary withdrawal of Mr Moncrieff from any active part in politics, is chiefly to be regretted, from the almost total absence of any lawyers in the House of Commons who know anything of Scotch

affairs. That a person can, in any sense, be said to be qualified for legislation, by a successful career as a merchant or manufacturer, or, from holding a large landed estate, is one of those fictions which are rapidly being rooted from the public mind. Something else is required in a representative, than a mere capacity to record a vote as the whip of his party directs. To entitle him to legislate on Scotch affairs, he should have that exact knowledge of our law and institutions, which actual practice for some years as a lawyer can only supply; and yet the only two Scotch members who can be said to possess these requirements are Mr Moncrieff and Mr Dunlop. If the former now abandons parliamentary duty, for the cultivation of his profession, the whole burden of representing the country must devolve itself, during the noviciate of the Lord Advocate, on the unaided shoulders of the solitary member for Greenock. This is the most unfortunate result of the late change in the administration. No one who has been accustomed to study the Scotch Statute Book can fail to see the immense service which Mr Moncrieff has been to the country. Alone and almost unaided in a House of Commons which has no experience of our laws and forms—which does not understand our requirements—and which has no knowledge how these are to be supplied—he has, during his tenure of office, passed a variety of measures of the greatest possible importance. He was called to office in the spring of 1851—was ousted in February 1852, on the accession of Lord Derby to power—and was again reinstated in January 1853, when Lord Aberdeen assumed the government. He remained under Lord Palmerston when he acceded to office in 1855, till the Liberal party were last month again sent to the cold shade of opposition. During all that period his administration must be said to have been of the most successful character. True, he has failed with the question of national education, from those narrow ecclesiastical prejudices which are not yet extinct in Scotland; but he has succeeded in carrying many important measures, which have already proved of the most solid utility to the country. In 1853 he brought in the Sheriff Court Act,—an Act which has done more for the profession and the public than any statute relating to process which it is possible to name. The new procedure it introduced, has caused a saving in time and cost that has added greatly to the business, and at the same time to the popularity with the public, of these important judicatories. The Act is, no doubt, exceedingly ill drawn: it has been said by a high authority, that it is not an Act of Parliament, but only notes for an Act of Parliament. In this particular, it is another added to the long list of examples we have had for some years, of the necessity of an immediate departure from the usage of the Crown Office, with respect to the drafting of bills. But, on the whole, the Act has been most successful in its operation,—a result which is no doubt partly owing to the readiness with which the profession in the country adapted themselves to the entirely new style of pleading which it introduced. Its chief defect is that it did

not provide for a proper system of appeal on questions of law. It disallowed all review in cases under L.25. Experience has shown that this is too great a limit; and, but for recent events, an attempt might have been made this session to rectify that mistake. The proper course would be, to extend the summary procedure of the Small Debt Court to all cases under L.25, and to give an appeal on matters of law, to be presented in the English form of a case, prepared by the parties or the judge. The same year, an important advance was made in religious toleration, by the abolition of University tests, and the substitution thereof of a declaration by the Professor, that he would not, directly or indirectly, inculcate opinions opposed to the Bible and Confession of Faith. On the other side of the account, we must place that most unnecessary measure for diminishing the number of Sheriffs, the object of which no one has ever been able to understand. By this Act, whenever a vacancy occurs, there are placed under one Sheriff:—(1.) The counties of Sutherland and Caithness; (2.) Banff is added to Elgin and Nairn; (3.) Linlithgow to Clackmannan and Kinross; (4.) Dumbarton to Bute; (5.) Haddington to Berwick; (6.) Roxburgh to Selkirk; and (7.) Wigtown to Kirkcudbright. The effacing, in this manner, of the old landmarks of the country, and the splitting it up into immense provinces, was a sacrifice of the whole principle of the double sheriffship; and, view the measure as we may, it must be confessed that, on this occasion, Mr Moncrieff showed that he was not above the influence of popular clamour. On the other hand, we must adduce in his favour the Acts establishing a system for the Registration of Births, Deaths, and Marriages, and an Annual Valuation of Lands and Heritages, whereby all assessments are now imposed. In 1856, were passed the Bankruptcy Act, and the Act for the Abolition of the Court of Exchequer. The former measure (now that the blunders of its draughtsman have been repaired) has given great satisfaction to the mercantile public; the latter rectified one of those constitutional mistakes which were committed at the time of the Union. The transference of the jurisdiction of the Court of Exchequer to the Court of Session, was the removal of only a nominal distinction. A much more important feature of the measure was the power given to grant expenses against the Crown. The Act, however, contains a great many arbitrary provisions in favour of the Crown—the right of reply, for instance—that ought never to have been there. Of the Lunacy Act of 1857, we still retain our former opinion, that it introduced a complicated, expensive, and altogether useless machinery, to meet an evil for which a very simple amendment of the law would have sufficed. But unquestionably the worst of all was the Court of Session Act of last year, which created a new distribution of the legal year, alike disadvantageous to the profession and inconvenient to the public. Surely, this session, an attempt will be made to rectify this most palpable blunder.

Such are the more important of Mr Moncrieff's public measures. Of his other official acts we cannot speak with the same approval. In particular, the mode in which he has exercised the patronage of offices rightly belonging to the writers to the signet, has been the cause of much dissatisfaction to that learned body.

We fear that this session will be a complete blank so far as regards Scotch legislation. We take from the papers the following important paragraph:—

LAND TENURE IN SCOTLAND.—In the House of Commons, on Tuesday evening, Mr Dunlop asked the Lord Advocate whether it was his intention to introduce, during the present session, any measure for the simplification of the titles to land in Scotland? The Lord Advocate said, that he could at present give no distinct pledge on the subject. The subject was important, and though a good deal had been done by his predecessor to improve the law of Scotland in this department, still more remained to be done with a view to making conveyances more speedy and economical.

The Valuation Bill of Mr Dunlop has been thrown out by the House of Commons. The object of the measure, viz., to furnish a complete classification of real property, whether assessable or not assessable, was an exceedingly desirable one, but the objections to the mode in which it was carried out were too weighty to be overlooked. Mr Dunlop's other bill, for the abolition of the *annus deliberandi*, should be confined to a simple reduction of the period from a year to six months. Some time should be allowed an heir to examine his ancestor's affairs, especially when he happens to be resident abroad, before being forced into litigation; and an interval should elapse, in order to prevent creditors getting the start of each other in constituting against the estate. Six months is the period during which no execution can take place with respect to executry; the same period has been fixed on in the bankruptcy statute, during which sequestration of a deceased's estate cannot be awarded; and it might be for professional convenience, were six months taken as the time during which action cannot be taken against an heir. But, meantime, the bill has been withdrawn, on an assurance by the Lord-Advocate, that its object will be provided for in a general measure, which, it is understood, is now in preparation, for the simplification of Scotch conveyancing.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

SPIER'S TRUSTEES v. STEVENSON'S TRUSTEES.—Feb. 22.

Superior and Vassal—Public Burdens.

A feu-contract contained an obligation of relief as follows:—"And, further, the said Archibald Spier binds and obliges himself and his foersaids, to free and

relieve the lands above desponed, of all teind, cess, or other public burdens payable out of said land in all time coming." *Held*—that the vassals were entitled to be relieved by the superior of all payments of and out of the teinds, and that the obligation of the superior, who was also titular, must in this case be construed as extending to future augmentations.

THE MAGISTRATES OF ABERDEEN v. WILLIAM ROBISON.—Feb. 23.

Clause—Construction—Cautionary Liability.

Vernon and Company, engineers in Aberdeen, granted a bond as principals, and the defender Robison, who was an advocate in Aberdeen, as cautioner, to the Treasurer of Aberdeen for payment of the yearly ground-rent of L.96 for the first three years after the entry of Vernon and Company to certain premises acquired by them from the Town of Aberdeen, Robison binding himself also, that Vernon and Company should implement the conditions contained in a disposition of the subjects granted by the Treasurer of Aberdeen, and also contained in the articles of roup. The bond contained a clause to this effect:—"In respect there are a variety of buildings already erected on the premises, with fixed machinery, etc., my said disponees shall be obliged to keep up these of the same value, and upon the whole of which" the ground-rent was declared to be a real burden; "and in case my said disponees shall discontinue the present works, they shall be bound to erect and maintain other buildings worth at least double the yearly ground-rent;" and, failing the erection of such buildings within two years, "they shall be obliged, upon the expiry of that period, to redeem one-half of said annuity, at the rate of twenty-five years' purchase; and it shall be optional to them at any time, within five years from the date of their entry, to redeem the whole ground-rent at the same rate of purchase." Vernon and Company discontinued the works in 1829. The Magistrates of Aberdeen thereafter raised an action against them and Robison, to have them compelled to redeem one-half of the ground-rent, and also concluding for L.1206, 5s., as twenty-five years' purchase of the same. Vernon and Company allowed decree in absence to go against them. *Pleaded* for Robison—According to a fair construction of the bond, he only became bound as cautioner for Vernon and Company for the ground-rent for the first three years after their entry, and was, therefore, not bound to redeem the one-half of the ground-rent; or, if the bond did contain any obligation beyond the three years, such obligation had been inserted *per incuriam*, and contrary to the intention of the defender, and could not therefore be founded on as against him. *Held*—that the defence was not relevant. The question was not what the bond ought to have been but what it was. Its terms were clear. The defence, that such an obligation had been inserted *per incuriam*, would not readily be allowed to any one, least of all to the defender, who was an agent, and had himself revised the bond.

WILLIAM BROWN v. JOHN RANKINE.—Feb. 24.

Statute—Process—Amendment of Libel.

Action to recover the statutory penalty of L.100 for bribing a voter at a Parliamentary election. The summons libelled the 17 and 18 Vict., c. 112, which declares the offence, the penalty, and the procedure. Before the action was raised, the period for which that Act was to last, had expired. But, before it did expire, the statute was continued by the 19 and 20 Vict., c. 84. This last statute was not libelled on. *Pleaded* for the defender—the action is not well founded, being laid on a statute which had no existence when the action was instituted; amendment is now incompetent. *Held*—that the original Act was still the law, and therefore the proper Act to be libelled. The continuing statute did not enact anything new; it did not even enact that the "provisions" of the former Act should be continued, but that the Act itself should be continued. Therefore, although this was a penal action, and as such requiring

dict construction, *held* competent to amend the libel, by setting forth the continuing statute; but observed, that it would have been a different case had the original Act actually expired and been then revised or re-enacted.

THE CARRON COMPANY v. WILLIAM DONALDSON.—*Feb. 25.*

Landlord and Tenant—Damage by Miscropping.

Action of damages against an agricultural tenant for miscropping. The Carron Company let a farm to Donaldson for nineteen years from Martinmas 37, he being bound to cultivate it in a husbandlike manner, and not to run out by over-cropping; and also to leave at least one-fourth part of the farm pasturage grass at the end of the lease. The lease expired in 1856. The papers concluded for were for alleged miscropping in 1852. *Pleaded* for the defender—assuming that there had been damage in 1852, that could have been repaired before the termination of the lease. No objection was taken to the addition of the farm at the termination of the lease, therefore the claim was incompetent, and was not made competent by being in dependence before termination of the lease. *Defence* repelled. Damage had been proved to have been sustained in 1852 by miscropping, and the present was a competent deed of recovering that damage.

ROBERT MALCOLM KERR v. JAMES WILKIE.—*Feb. 26.*

Statute—Construction.

The Kelvin Bridge Act 1852, enacts, that certain parties therein named, "and other parties who hold in their own right the sum of L.100 of annual feu-ties" from certain lands, "shall be, and they are hereby appointed, the trustees for carrying this Act into execution, and shall be called the Kelvin Bridge Trustees." In a reduction of proceedings imposing assessment, on the respondent that the pursuer, who possessed the statutory qualification of a trustee, and who was not named in the Act as a trustee, had not been called to attend meetings:—*Held*, on a construction of the whole statute, that the acting trustees were those named in the statute, and that their number were to be limited from persons having the statutory qualification. Therefore that the decision to call the pursuer was not a statutory nullity.

LOSE, WILSON, AND BELL v. MARTIN AND OTHERS.—*March 3.*

Leave to Appeal.

The Court having pronounced an unanimous judgment in favour of the defenders, the pursuers presented a petition for leave to appeal. *Objected*, issues have been adjusted for trial, and leave to appeal would be virtually leave to spend the proceedings for two years. If granted, it ought at all events to be under the condition of the appeal being presented within a limited time. *Replyed*, leave to appeal does not stop proceedings so long as an appeal is actually pending. *Held*, that leave to appeal being tantamount to an indefinite sist, was granted to appeal only up to 1st June next.

DIXON AND JOHNSTON v. MILLER AND OTHERS.—*March 3.*

Feu-Contract—Entry of Heirs.

Action relative to the adjustment of a feu-contract which the purchaser objected in preference to an ordinary disposition. The price of the subjects was to be L.3000; either the whole or the half of that sum was not to be paid, but to be converted into a feu-duty at a certain rate. When the title was offered, a question arose as to the sellers power to convey; but the Court held that it was sufficient. They also, of consent of the purchasers, decreed them to make payment to the sellers of L.1500, and to execute a feu-contract for an annual feu-duty of L.75, "with all usual and proper clauses." It was proposed to insert the words—"and paying as composition on the entry of every heir and singular successor, to the aforesaid subjects, one penny and no more, to which the composition is hereby taxed." *Objected* by the sellers:—There

ought not to be any taxing words at all. There was no stipulation in the arrangement between the parties that, in the event of the purchaser electing to take a feu-right, the relations of superior and vassal should be put in abeyance. The sellers were bound to enter with their own superior, and to pay their own casualties, and it was reasonable, therefore, that they should be entitled to make a similar demand against the purchaser as their vassal. *Held*, that it was not inconsistent with the transaction between the parties, nor with the previous judgment of the Court, that the entries should be taxed, which, moreover in feu-contracts, was not unusual, but that the sellers were entitled to get the annual payment or feu-duty clear, and, therefore, the purchaser would be liable to them in relief of any payment which they might have to make to their own superior for the ground conveyed.

WILSON v. CONNELL.—March 6.

Process—Advocation—Competency.

Question of competency of an advocation. An action had been raised in the Sheriff-Court for L.32, 0s. 3d. The defender tendered and consigned L.25, which the pursuer thereafter uplifted. The sheriff found that the pursuer had failed to instruct any liability beyond what was originally admitted by the defender. The pursuer advocated, and the sum in dispute being thus reduced to L.7, the defender objected to the competency of the advocation. *Held*, that the consignment had been made with reference to a view of the case not acquiesced in by the pursuer, and that neither the consignment on the one hand, nor the uplifting of the consigned money on the other hand, implied any intention on the part of either litigant to give up the right of review of a judgment pronounced after they had joined issue in a cause, which, at first was advocable, and must continue to be so unless something was done by the parties clearly to deprive it of that character.

VANS AGNEW, *Petitioner*.—March 9.

Entail Amendment Act—Improvement Expenditure.

The Court allowed, as improvement expenditure under the Entail Amendment Acts, sums expended on two mansion houses belonging to the petitioner, as heir in possession of two entailed estates, which were at one time held by different titles, but were now included in the same entail and destined to the same series of heirs. The estates were discontinuous, and the repairs such as the heir in possession was not bound to make in order to keep up the houses. The one mansion was occupied by the petitioner himself, the other was used as a jointure house.

THOS. WIGHTMAN v. CHARLES WILSON.—March 9.

Process—Letters of Supplement—Jurisdiction.

Action of furthcoming at the instance of Wightman against Wilson, in whose hands arrestments had been used upon a registered protest by Wightman against the common debtor Geddes. A bill was granted by Geddes to Wightman upon 25th April 1854, payable at four months. On 30th August 1854 it was protested, and the protest recorded by Wightman. Arrestments were used on 5th September. A furthcoming was raised in the Sheriff-Court of Forfarshire on 14th September; and on 15th September, citation was given to Geddes at his former place of residence; but Geddes had left his place of residence, and gone abroad for more than forty days before the date of citation—the exact date was not ascertained. The arrestee, Wilson, objected to the validity of this citation. The common debtor, at the date of citation, had not a dwelling-house "occupied by his family and servants," therefore the summons ought to have been executed against him as out of the kingdom. *Held*, that the citation was bad, and that it could not be cured by letters of supplement in the Sheriff-Court. That was not the proper forum for citing a foreigner, which the common debtor now was. This was not an action *rationes rei sitæ*, which applied only to real actions. The sheriff had no longer jurisdic-

tion ; and, in consenting to registration for execution, the common debtor consented only to submit himself to that particular jurisdiction to which foreigners were amenable—the Supreme Court. Therefore objection sustained.

JAMES MABON, *Petitioner*.—*March 16.*

Bankrupt—Discharge.

An undischarged bankrupt, whose estates were sequestrated in 1832, under the Bankruptcy Act 54 Geo. III., prayed for an order appointing the future proceedings in the sequestration to be regulated by the recent Bankruptcy (Scotland) Act, 1856, in terms of section 3 of the latter Act. The petition was intimated on the walls, in the minute-book, and in the Edinburgh Gazette. A final dividend had been paid to the creditors, the trustee had been discharged, and the bankrupt now desired to avail himself of the expeditious and inexpensive mode of obtaining his own discharge provided by the recent Act. *Held*, that that was a legitimate object, and the prayer of the petition granted.

JOHN MILLER v. JOHN DUNCAN.—*March 18.*

Bankruptcy—Trustee—Procedure.

Competition for the office of trustee on a sequestrated estate, under the 19 and 20 Vict., c. 79. At the meeting for the election of trustee each candidate claimed a majority of legal votes, and protested against the validity of the votes for the opposing candidate. The creditors made no declaration of the election, but instructed the preses to report the proceedings to the sheriff. Miller afterwards lodged a note of objections against the votes for Duncan, but the note did not state by whom drawn. Duncan did not lodge any note of objections. *Held*, that a note of objections was not a pleading in a cause requiring strict formality in its language, and, therefore, that the absence of the words, "by whom drawn" was not a fatal objection. Farther, that the effect of the competing candidate not lodging a note of objections, was only to preclude his stating any objections before the sheriff to the votes for Miller. It did not imply that he himself had withdrawn from the contest. Also, that under the present Bankruptcy Act it was not necessary for the creditors to declare, in their minutes of the meeting held for the election of a trustee, which of the competing candidates had been elected.

JANET WILLIAMSON OF GRAHAM v. THOMAS LINTON.—*March 18.*

Public Officer—Privilege—Issues.

Action by a licensed broker against the Procurator-Fiscal of the Police Court, for L.400 as a solatium and damages for alleged oppression and real injury, in respect that on the complaint of the defender, the sheriff granted warrant for her apprehension on a charge of reset of theft,—that she was taken to the police office, and without notice given to her of the charge, or time given her to prepare for her defence, or obtain witnesses to support it, she was sentenced to forty days imprisonment, under which sentence she was confined from the 3d to 17th November. Her license was revoked on her conviction. On 24th November the Court of Justiciary suspended the sentence *simpliciter* with expenses. *Defence*.—The defender, as a public officer, is privileged, and must be proved to have acted maliciously and without probable cause. *Held*,—that the pursuer was entitled to an issue of wilful oppression, out of which real injury had arisen. But it did not follow, that a procurator-fiscal was necessarily liable to a prosecution for damages in every case where imprisonment had followed on proceedings instituted by him—and where the sentence was quashed. A competent tribunal having decided upon his complaint, the party complained against was then in the hands of the law—not of the procurator-fiscal, who could not then prevent imprisonment even if he wished it.

NATIONAL EXCHANGE COMPANY v. DREW and DICK.—March 19.

Appeal—Discharge of Trial—Expenses.

Issues in this case were adjusted two years ago. The case was set down for trial in a few days. The defenders having appealed against certain judgments of the Court of Session, no order for service of the petition had been made by the House of Lords; but, in consequence of an objection taken to its competency by the pursuers, it had been remitted to the committee on appeals. *Held*—that notwithstanding the appeal, it was competent to go on with the trial, but that it was inexpedient to do so. Therefore, notice of trial discharged on payment of such part of the pursuers' expenses as would not be afterwards available. *Held*—also competent to grant decree for the expenses.

SECOND DIVISION.

DUNBAR v. LEVACK.—Feb. 10.

Nuisance Removal Act, 12 and 13 Vict., c. 111—Construction—Review—Liability to abate nuisance on a road or street. Stats. 10 Geo. III., c. 51; 9 and 10 Vict., c. 41, sect. 22.

Part of Sir George Dunbar's entailed property near Wick is let on building leases for ninety-nine years, under the Act 10 Geo. III., c. 51. On a complaint by the inspector of the poor, under the Nuisance Removal Act, against Sir George, and Craig, one of his tenants, setting forth that the road and drains attached thereto, opposite Craig's house, were in a filthy and unwholesome condition, and likely to be prejudicial to the health of the neighbourhood; appearance was made for Sir George, and an order was made, ordaining him to remodel and reconstruct the roadside drains and gutters opposite Craig's house. Sir George raised an action concluding for reduction of the order and relative proceedings, and for declarator, that he was not bound to reconstruct and remodel the road, as ordered by the sheriff. The defender pleaded, the road was the property of Sir George Dunbar, and had not been let; it was a road leading to Sir George's lands let on agricultural leases, the value of which it enhanced; in which circumstances the pursuer was properly proceeded against. The Lord Ordinary assolvied the defender. The Court altered that judgment, and decerned in terms of the conclusions of the summons. *Observed* by Lord Cowan—A road or street could not be held to be included under the term premises, and the proceedings against owners or occupiers of houses or premises were not applicable to cases of nuisance on roads or streets, the proceedings for abatement of which were otherwise provided for.

HUTCHISON v. FRASER.—Feb. 12.

Poor—Residential Settlement—Continuous Residence.

Margaret Wright, a native of the parish of Boharm, was employed as a domestic servant in the parish of Old Deer, at Whitsunday 1846, where she continued till October 1848, when she returned to her father's house in Boharm, till April 1849. She then spent a week in Old Deer, and expressed a wish to return to her service, but was not taken back. With the view of becoming a dressmaker in Old Deer, she went to Elgin and Aberdeen to learn that business, and returned to Old Deer in Aug. 1849, where she lived in a hired apartment till July 1851, when she became insane, and received parochial relief from the inspector of the poor of Old Deer. In an action at his instance against the inspector of Boharm, for the relief afforded her, it was pleaded by the defender that she had acquired a settlement by five years' residence in Old Deer. The Sheriff-Substitute and Sheriff of Banffshire, and the Lord Ordinary (MacKenzie) assolvied the defender, and *found* she had acquired an industrial settlement in Old Deer. The Court reversed that judgment, and held that she had not acquired a settlement in Old Deer.

Authorities.—Dunlop's Poor Law, p. 48, sect. 56 (4th edit.); Parish of Dal-

mellington v. Parish of Irvine, 3d Dec. 1800, Mor. Appx., *voce* poor, No. 2; Hay v. Cumming, 6th June 1851, xiii. D., 1057; Hay v. Kirkpatrick, 9th July 1851, xiii. D., 1313; Roger v. Mackonochie, 5th July 1854, xvi. D., 1005 Hay v. Beattie, 1st Dec. 1857, xx. D., 146.

WATERSTON v. THE EDINBURGH AND GLASGOW BANK.—Feb. 19.

Stamp—Bank—Letter of Credit. Stats. 53 Geo. III., c. 184, sect. 13; 16 and 17 Vict., c. 59.

The manager of a country branch of the Edinburgh and Glasgow Bank gave M'Gregor, a customer who carried on business as a cattle-dealer, a document in these terms:—"Coupar-Angus, 15th Sept. 1856. Be so good as pay the orders of Mr M'Gregor on me, which will be paid on presentation here. The same to be confined to one thousand pounds, and to be paid within one fortnight from this date." This document was not addressed, it was presented by M'Gregor to the officer acting for the Caledonian Banking Company at the Muir of Ord Market, who cashed a cheque for L.1000, written on the back of it by M'Gregor, and addressed to "the agent for the Edinburgh and Glasgow Bank, Coupar-Angus." The cheque having been dishonoured; this action was raised at the instance of the Manager of the Caledonian Banking Company, founding on the letter granted by the defenders' agent: the defenders pleaded, *inter alia*, that the letter was null and inoperative, in respect it was a letter of credit, and was not stamped. The Lord Ordinary (Ardmillan) sustained that plea. The Court adhered (Lord Justice-Clerk *diss.*, Lord Wood *abs.*)

THE SCOTTISH MISSIONARY SOCIETY v. THE HOME MISSION COMMITTEE OF THE CHURCH OF SCOTLAND.—Feb. 19.

Testament—Legacy—Construction.

A legacy was bequeathed by a member of the Established Church to "*the Scottish Missionary Society of the Established Church.*" There being no society of that name, the Scottish Missionary Society and the Home Mission Committee of the Church of Scotland were called, in an action of multipointing, and lodged claims. The one society is composed of ministers and laymen favourable to missions, of all denominations, and many clergymen of the Established Church have taken an active part in its management, and particularly prior to 1843. The other society is in connection with the Established Church, and has for its objects those of the committees of the church, formerly in existence, for promoting Church extension; for aiding congregations already established; for the employment of probationers; and for the encouragement of young men to the office of the ministry. The Lord Ordinary (Ardmillan), on the ground that the legacy could not be held to be in favour of the Scottish Missionary Society, that society not being in connection with the Church of Scotland, and that it could not have been intended for the Home Mission Committee, another legacy having been left to them, found that it had lapsed. Both claimants reclaimed. Lord Murray was of opinion that the Home Mission Committee should be preferred. The majority (Lords Cowan and Neaves, Justice-Clerk *abs.*) *held*, that the Scottish Missionary Society should be preferred. *Observed* by Lord Cowan—The testatrix had in view a missionary society, which properly was a Society for the conversion of the heathen; the Scottish Missionary Society had this for its object, which the Home Mission Committee had not; and the former did not belong to any particular sect of Christians, more than to the Established Church. In such circumstances, he was giving effect to the law, as laid down in the case of Somerville's Trustees, 22d Jan. 1830.

Authorities.—Bernesconi v. Atkinson, 18th Jan. 1853 (Chancery), x. Hare's Cases, p. 345; Rishton v. Cobb (Chancery), 16th December 839, v. Mylne and Craig, p. 145; Ward on Legacies, p. 96; Wigram on Wills, pp. 134, 168.

EDINBURGH AND GLASGOW RAILWAY COMPANY v. HISLOP AND OTHERS.—Feb. 24.

Poor Assessment—Railway—Annual Value—Expenses.

The Edinburgh and Bathgate line of railway is in the possession of the Edinburgh and Glasgow Railway Company, under a statutory lease for 999 years, at a fixed rent, which amounts to the sum of L.9500 yearly. The parishes through which the Edinburgh and Bathgate Railway passes, impose assessments for the poor under the 34th section of the Poor Law Amendment Act, according to the *annual value* of the lands and heritages, one-half upon the owners, and the other half upon the tenants and occupants. These parishes claim right to assess the Edinburgh and Glasgow Railway Company as tenants of the Edinburgh and Bathgate line, on the footing that the "annual value" thereof should be taken to be, and is, the rent above mentioned, viz., L.9500. The Edinburgh and Glasgow Company seek to be relieved of the assessment, by an action of declarator, in which they found upon the 37th section of the Act which provides that, the annual value of lands and heritages shall be taken to be the rent at which they might be reasonably expected to let from year to year, under deduction of the probable cost of the repairs, insurance, etc. It was alleged by the pursuers, that the line which was the subject of the lease, was not in existence at the time when the agreement of lease was entered into; that the yearly consideration paid therefor did not represent the true annual value thereof, and was not the rent which a tenant might fairly be expected to give. The true annual value, according to the principles laid down in the section of the Act above quoted, was stated to be only about L.725. The Court held, that the rent being actually fixed and paid by the pursuers, the parochial boards were entitled to take it as the annual value; and a judgment pronounced by Lord Neaves, finding that no sufficient grounds to support the conclusions of the action had been set forth, and, therefore, dismissing the action, was adhered to. It was also held, that as all the defenders had the same ground of defence, and ought to have concurred in a joint defence, the pursuer should only be found liable in one account of expenses, and in the expenses of a consultation at the commencement of the process.

Authority for Pursuer.—South-Eastern Railway Co. v. Dorking, 7 Railway Cases, 877.

HAY, THOMSON, AND BLAIR v. THE EDINBURGH AND GLASGOW BANK.—Feb. 26.

Proof—Diligence—Confidentiality.

This case related to a bill of Exchange for L.1000, which was said to have been misapplied by the defenders. The summons concluded for restoration of the bill, or payment of the contents. Issues having been adjusted, the pursuers obtained a diligence for recovery, *inter alia*, of all letters or memoranda during the period from 1st July 1855, to 19th June 1856 (the date of raising the action), passing between the agent or other officer of the bank at Leith, and the directors, office-bearers, or agents of the bank in Edinburgh, relative to the bill. Under this diligence, the law agent of the bank in Edinburgh was examined as a haver. He deponed, that he was in possession of certain documents falling under the above description, but declined to produce them, on the ground that they were of a confidential nature, "being all dated subsequent to 30th of July 1855, from which date the defenders had reason to suppose that a claim would be made against them in reference to the bill in question." It was argued for the pursuer, upon the matter coming before the Court, that nothing had happened on 30th July, which could make subsequent communications confidential, and that there was no instance of the plea of confidentiality having been carried so far. The Court, however, holding it to be settled that the plea of confidentiality was not limited to communications subsequent to the date of the action, after satisfying itself by inspection that the documents were in themselves of a confiden-

tial nature, and written at a time when the defenders had reason to expect legal proceedings, sustained the haver's objection.

Authority.—*Rose v. Medical Invalid Insurance Society*, Nov. 27, 1847, x. D., p. 156.

TURNBULL v. KEMP AND RUSSELL.—*Feb. 27.*

Poor—Settlement—Proper Object of Parochial Relief.

Catherine Burnside was born in the parish of Moreham in 1792. For fourteen years prior to October 1846, she resided in the parish of Haddington, and acquired a settlement. In October 1846 she left Haddington and removed to the parish of Gladsmuir, where she subsequently resided, and in January 1850, applied for and obtained parochial relief from the inspector; this was approved of by the Parochial Board on 2d of March, as "temporary aid." On 17th January 1850, the inspector of Gladsmuir gave notice to the inspector of Haddington, that the pauper had become chargeable to the parish of Gladsmuir, and that Haddington, as the parish of settlement, was held liable for her support. In a statement of the case sent on 30th January, he wrote to the inspector of Haddington, that the pauper and her family were in a state of destitution, from scarcity of work, and frequent inability to labour. The inspector of Haddington sent a medical man to examine her; and, on his report, that she was able-bodied, intimated to the inspector of Gladsmuir, that the Parochial Board of Haddington did not admit any liability for her maintenance. No notice was given at this time to the parish of Moreham. After receiving the aid above-mentioned, she neither applied for, nor obtained parochial relief for twelve months, during which time she was in ill-health, and supported chiefly by the earnings of her natural daughter, and the occasional assistance of neighbours, but without resorting to common begging. In February 1851, she applied for parochial relief to the inspector of Gladsmuir, and was placed on the roll of paupers. At this time she had been continuously absent from the parish of Haddington for upwards of four years and three months, and the inspector of Gladsmuir therefore gave notice to the inspector of Moreham, that she had become chargeable as a pauper, and that Moreham, as the parish of her birth, was held liable for her support. The Parochial Board of Moreham refused the claim, alleging that she had become chargeable as a pauper before she forfeited her claim on Haddington. An action was raised by the inspector of Gladsmuir against both parishes, concluding for relief from one or other of them, as being the parish of settlement. In this action, it was averred, that the pauper had been unfit for work and a proper object of parochial relief since the end of 1849; and the sheriff-substitute, after a proof, assolvizied Moreham, and found Haddington liable as the parish of settlement. In an advocacy by the inspector of Haddington, he pleaded, that the pauper having been absent for more than four years from the parish of Haddington, without having established during that time any claim to be considered a proper object of parochial relief, must be held to have lost her settlement in Haddington. The Court, in adhering to a judgment by Lord Mackenzie, held, that admission to the roll is the test of pauperism in a question of retention of residential settlement, and that it could not go into allegations by the parish of birth that the pauper ought to have been admitted as a proper object of parochial relief at an earlier period, and before a residential settlement had been lost by absence; that, in the circumstances, the small temporary aid given by Gladsmuir in 1850, had not prevented the loss, by absence, of the pauper's residential settlement in the parish of Haddington; and, with much difficulty on the part of the majority, that the statements and admissions of Gladsmuir as to the pauper having been a proper object of parochial relief from January 1850, did not exclude that parish from asking relief from Moreham. Therefore their Lordships assolvizied the inspector of Haddington, and decerned against the inspector of Moreham, the parish of birth; refusing, however, expenses to Gladsmuir.

Authorities for the Inspector of Moreham.—*Porteous v. Blair*, Dec. 16, 1856, xix. D., p. 181; *Hay v. Thomson and Others*, Feb. 6, 1856, xviii. D., p. 510.

MAGISTRATES OF EDINBURGH v. PATON AND RITCHIE.—March 3.

Construction—Servitude.

The defenders' are proprietors of the ground behind St Andrew's Church, in Edinburgh. The ground was fued by the Magistrates, subject to a servitude thus expressed in the feu-charter: that the feuar "shall not erect any building whatever nearer to the said church than the distance of twenty-five feet from the line of the extremity of the elliptic part of the church." Within six feet of the wall of the church a cellar was constructed under ground, in which the defenders placed a steam-engine, furnace, and boiler. In an action of declarator, etc., the defenders contended, that the prohibition only applied to buildings on the surface of the ground. *Held*, adhering to the judgment of Lord Mackenzie, that the pursuers were entitled to prevent the construction of cellars under the surface, and that the defenders were bound to remove them.

LESLIE v. DAVIDSON'S REPRESENTATIVES AND OTHERS.—March 6.

Expenses.

In an action against a number of defenders, each of them gave in separate defences. The Lord Ordinary sustained a preliminary plea to the effect, that the averments were not relevant to support conclusions for joint and several liability, to which the Court adhered, and found the defenders entitled to expenses. The pursuers objected to pay the expenses of all the defenders, each of whom was represented by counsel at the debate in the Inner House. *Held*, that each defender was entitled to the whole expenses incurred in preparing the record, and up to the date of the Lord Ordinary's interlocutor; but the case having been limited to a single point after that judgment, and all the defenders having thereafter the same plea to support, that the expense of the debate in the Inner House should only be allowed to one, each of the other defenders being entitled to a fee for one counsel to be present at the debate to watch the case.

Authorities cited.—Bett v. Arnott, June 27, 1828, vi. S. and D., p. 1032; Campbell and others v. Sir T. Dick Lauder's Representatives, Jan. 22, 1833, xv. D., p. 311.

MARSHALL v. YOUNG.—March 6.

Liability of Lands within a Burgh of Barony to Police Assessment under Stat. 3 and 4 Will. IV. c. 46—Construction.

The Police Act 3 and 4 Will. IV., c. 46, "passed for the purpose of enabling the burghs of regality and of barony in Scotland" to establish a system of police, declared, that the boundaries of all such burghs shall be such as are established by charter, grant, prescription, Act of Parliament, or otherwise, and within a distance not exceeding one thousand yards from the boundaries of such last mentioned burghs. The commissioners for the purpose of executing the Act are empowered to assess all tenants, occupiers, and possessors of "premises" valued at two pounds or upwards of yearly rent, within such burghs. In 1840 the inhabitants of the burgh of barony of Kilsyth adopted the Act: Young, as the tenant of a farm within the boundaries of the burgh, was assessed on a rental of L.70. He raised an action, in which one of the burgh commissioners was called as defender, concluding for declarator, that the commissioners had no right to assess him and others in respect of any farm or lands held for agricultural purposes. Lord Neaves (Ordinary) *held*, that lands occupied for agricultural purposes were not assessable; but, without prejudice to the powers of the commissioners, in assessing other subjects legally assessable, to include in the valuation thereof any lands forming a proper pertinent or adjunct thereof. The defender reclaimed; the Court adhered.

The Reclaimers cited Smith v. Scott, Feb. 15, 1851, xiii. D., p. 702.

TURNER v. TURNER AND HIS CURATOR.—March 6.*Parent and Child—Aliment to a Daughter.*

The defender, a major in the East India Company's service, on half-pay, is insane, and the inmate of a lunatic asylum. His daughter, aged 29, had endeavoured to procure employment, but unsuccessfully. In an action at her instance against her father and his *curator bonis* for aliment, the latter averred, that the father's income amounted to L.268, and the expenses of his maintenance, etc., to L.230; but that part of his income (L.85) was the interest of money lent on heritable security, which might be reduced by a fall in the rate of interest. The Court found the pursuer entitled to L.30 per annum till further order.

JOHNSTONE v. THE COMMERCIAL BANK OF SCOTLAND.—March 11.*Process—Relevancy—Damages.*

Johnstone raised this action of damages on the following averments. In September 1840 he entered into an agreement with the bank, in terms of which, he disposed heritable property in security for a cash-credit for L.10,000. He operated upon the account until May following, when he had drawn L.7195, and the bank declined to make further advances. His brother died in February 1841, leaving some heritable property, to which Johnstone succeeded. On the bank's refusal to make advances beyond L.7000, Johnstone employed the agents for another bank to make up his title to his brother's property, and arrange for a transference of his account to their bank. He was not infest till August 1841. A bill, drawn by the pursuer for L.180, fell due on 12th July, and a promissory note for L.1000, by Johnstone to his brother, fell due on 2d August, both were in the hands of the Commercial Bank. The bank did not put these bills to the debit of the cash-account, but did diligence upon them, by charging the pursuer on 24th August, and on the same day, letters of inhibition raised on the cash-credit and on the bills, were served on him. Other letters of inhibition, raised on a cash-credit allowed to Johnstone's brother, and in which Johnstone was a co-obligant, were served on 27th August. The pursuer being deprived of the full use of his cash-credit, his affairs became embarrassed, and he required to apply for sequestration. The summons concluded for L.6000 as *solatium* and damages for the injury caused the pursuer by the proceedings complained of. *Held*, that the bank were entitled to cease advancing money to the pursuer whenever they thought it proper to do so: that he had due notice of their intention to refuse him further accommodation: that the bank were not bound to place the bills to the debit of the cash-account, and were entitled to do diligence upon them: that the averments were not relevant to support the conclusions of the action, and the defenders were entitled to absolvitor.

GUTHRIE v. GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.—March. 18.*Property—Servitude—Disposition—Arbitration.*

A railway company entered into a submission with a proprietor, through whose lands the railway was made, as to the price to be paid for the ground occupied. The proprietor claimed an additional sum in respect he would be deprived of the agricultural use of a stripe two feet broad, next the fence to be erected by the railway; to which it was replied for the railway company, that such a claim was unnecessary, as their fences were always erected two feet within their boundary. The arbiter issued notes, stating that he considered the proprietor entitled to L.3588, but taking no notice of the claim for loss of ground along the fence. No award was ever executed, the sum of L.3588 being paid by the railway company, who got a disposition, without any reservation. A hedge was planted two feet within the railway company's boundary, and a paling to protect the hedge was put up on the boundary sometime afterwards a wall on the boundary line was substituted for a part

of the hedge and paling. The heiress of the proprietor raised an action, concluding for declarator, that the railway company were bound not to erect a fence nearer than two feet to the margin of their property, and for damages for the time during which the paling on the boundary was maintained. In support of the action the pursuer founded upon the pleading before the arbiter. *Held*, by Lord Mackenzie (Ordinary), that the disposition imposed no such obligation on the company as was sought to be enforced; that there was not proved to have been any such obligation undertaken by them, and that the defenders' were entitled to absolvitor. On a reclaiming note the Court adhered. Observed by the Lord Justice Clerk: It was likely the arbiter had estimated the price on the footing alleged by the pursuer. Had the arbiter's notes referred to the claim, as so disposed of, his lordship would probably have felt that the pursuer had succeeded in making out the obligation averred; but it was not competent to prove by the arbiter's testimony what passed in his mind and was the ground of his award. The proprietor had just trusted to the assurance of the company; but their undertaking formed no part of the transaction, as appeared from the disposition, and no separate obligation by them had been produced.

LENAGHAN v. MONKLAND IRON COY.—*March 19.*

Interest on Damages for Assessment.

The pursuers, the widow and children of a miner, were found entitled to damages for his death, caused by injuries received by him in a coal-pit. There were two trials, in which the pursuers had been found entitled to damages, the first verdict having been set aside. The pursuers craved interest on the damages found due to them from the date of the accident. No claim for interest was inserted in the schedule appended to the issues. The defenders resisted the motion, on the ground, that the time that had elapsed subsequent to the accident and before the trial, had been most likely taken into consideration by the jury. *Held* that the pursuers were entitled to interest from the date of the last verdict. Observed by the Lord Justice Clerk, that in any other case of the same nature, unless interest was asked from the jury, he would inform them that none would be allowed by the Court when the verdict did not find interest due.

APPEALS IN THE HOUSE OF LORDS.

LINDSAY v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Arrestment jur. fund. causa.

The pursuer, a fruit merchant in Edinburgh, arrested funds belonging to the defenders, an English railway company, in the hands of the Caledonian Railway Company, and raised an action against them, containing conclusions declaratory as to their obligations as carriers, and petitioning for damages for the breach thereof. The Court of Session held that they had jurisdiction in such a case in virtue of the arrestment. (Court of Session, 20th Nov. 1855, xviii. D., 62. H. L. Feb. 23, 1858, xxx. L. T. Rep. 357.)

The LORD-CHANCELLOR—My Lords, this case raises a very short though important point. The only question is, whether or not the Court of Session has jurisdiction to determine this case. An action was brought by Mr Lindsay, who is a fruit merchant in Edinburgh, against the London and North-Western Railway Company, which, I need not say, is a company established in England, and the complaint he raised is this: that the defenders, being in the nature of common carriers from Liverpool to Edinburgh, their railway joining other railways at Liverpool, but contracting as common carriers to forward goods from Liverpool to Edinburgh, were guilty of misconduct in their dealing with Mr Lindsay, in that they would not properly carry his fruit—it does not matter what the exact particular of the complaint is; either that they did not carry it

properly, or that they refused to carry it except upon certain terms, or that they otherwise conducted themselves as common carriers ought not to have me. To that complaint several answers were made by the railway company. The only one which is now before your Lordships is this. By their answer, pleaded in their second plea, they say that the defendants, being an English company, and their line of railway being wholly in England, and the act complained of by the plaintiff having occurred in England, and the action being a question of declarator of the defendants' obligations under the common and statute law of England, the plaintiff is bound to pursue the defendants in the courts of England, and the arrestment used by him is inept to found a jurisdiction against the defendants. In order to get a jurisdiction the Court of Session seized certain funds or debts belonging to the present appellants, the defendants in Scotland, *jurisdictionis fundandæ causa*. The only question which is now to be determined is, whether that arrestment did or did not give jurisdiction. Now that must depend upon what are the authorities as to this point the law of Scotland. The Court of Session held that they have jurisdiction. I am prepared to state to your Lordships, that I think that that decision rests upon authority which it would be quite impossible or improper for your Lordships to controvert, even if there were more difficulty in acting upon it than in truth I think there is. It was urged against this principle, that the adoption of it leads to conclusions of very great inconvenience, not to say absurdity. And extreme cases were put by the Attorney-General in his argument, such as, if a gentleman leaves his umbrella, or—as one of the judges puts it—if a gentleman leaves a toothpick, would that give jurisdiction? I think there are two answers to that. In the first place, one of the learned judges—Lord in this case, or in one of the other cases which has been referred to, says that the property seized must not be so small as to make the thing illusory. There may be difficulty in dealing with that; but that is one answer. Another answer is this: that the decision of the present question does not determine how far the jurisdiction may go—whether it can go beyond the property seized or not. And if, according to the opinion of some of the judges, the only effect of the arrestment is to give jurisdiction, so as to take execution against that which is arrested, then the smallness of that which is arrested could only show that in such a case only a small remedy can be obtained. But, in truth, we are not to examine too closely into what are the consequences, or into what was the origin of this jurisdiction, if we find, as I think we undoubtedly do find, that for at least a century, or more than a century, this jurisdiction has been exercised, and this arrestment has been considered to be a useful foundation for the jurisdiction, and one which has been acted upon by the court apparently as one that admitted of no doubt. Now there are earlier cases on the subject, but the first that has been referred to, which is important, is a case reported in 1758, which is now exactly 100 years ago. The case was this: “Ford, a merchant, residing in Berwick, intended to apply to the sheriff of the Merse for a border warrant to arrest the goods of Tabor and Thomson, two merchants in London, his debtors, but was advised that the sheriff might have a difficulty in granting this warrant as in other cases, because Ford was an Englishman, and resident in England. A petition was therefore given in to the Lord Ordinary on the bills, who reported the case to the Lords. The court was unanimously of opinion that the Lord Ordinary should grant the warrant for arrestment *jurisdictionis fundandæ causa*, and approved of this method of applying to the court, seeing a petition to the whole Lords was unnecessary, as there was no intimation to the defenders.” That case was so decided in 1758. When Mr Erskine wrote his learned work a very few years afterwards, he treats the matter as clear, because he says, “when a foreigner who is actually abroad hath no other than moveable effects within this kingdom, he is accounted so little subject to the jurisdiction of its courts that no action can be brought against him till those effects be attached by an arrestment called *arrestum jurisdictionis fundandæ causa*.” Then a few years afterwards, in

1772, the question was discussed in *Scruton's case*, 1 Hailes, 499, in which it is true it was held that the jurisdiction did not prevail. But why? Not because the jurisdiction did not exist in ordinary cases, but because that was a case in which the question was as to the personal *status* of the individual pursuer, whether or not she was the lawful wife of the defender, having been married in Ireland in some way the validity of which was doubted. And it was held that for the purpose of an action of that nature this jurisdiction did not exist. But ever since that case, this has been treated as the established law, and I cannot find that the least doubt was thrown upon it in the several cases which occurred intermediately between that case and the more modern cases, some very few only of which I will just refer to, which show, as it appears to me, very clearly, that this has been from the first understood to be the law, and has been always acted upon as the law. In 1831 there arose the case of *Douglas v. Jones*, 9 S. D., 856. That was an extremely strong case to show the opinion of the courts upon that subject. In that case an Englishman of the name of Jones, a gentleman residing in London, took a lease of a house in Glasgow for seven years for the purpose of carrying on the business of a grocer there in partnership with other persons. An action was brought against Jones in the Court of Session, and in order to give jurisdiction, they arrested certain debts due to Jones from the firm of grocers that were carrying on the business at Glasgow. It was contended that the lease was in truth the possession of real property by Jones in Scotland, and that that undoubtedly gave jurisdiction. No doubt, if a person has heritable property in Scotland, that entitles the Court to exercise jurisdiction over him. But the matter being discussed, it was held that that was not so—that the lease was not sufficient to give jurisdiction; but on the other hand, that there certainly was jurisdiction by the seizure of the debt, though it was only an unliquidated debt to be ascertained by taking the accounts between him and his partners. That appears to me an extremely strong case. But there was a still stronger case in 1846, the case of *Parkin v. The Royal Exchange Assurance Company*, 8 D. B. M., 356. Parkin was an Englishman resident in London. The Royal Exchange Assurance Company, I need not say, is an English corporation. Lord Elbank having died, there was money due upon his policy, and inasmuch as the Royal Exchange Assurance Company had money deposited in a bank in Scotland, the pursuer proceeded in the Scotch courts to recover the money due upon the policy, and founded his jurisdiction by arresting the money that was due to the company in the bank. Now, that was an extremely strong case, because there both parties were permanently resident in England. It was only the accident of there being money due to the Royal Exchange Assurance Company in a bank in Scotland, which gave any jurisdiction to the Scotch courts upon the subject. But in that case Lord Moncrieff says: "I can have no doubt that this Court has jurisdiction, in virtue of the arrestment of the funds of the defenders in Scotland *ad fundandam jurisdictionem*, to entertain and give judgment in the present action. That form of process has been long established in our law, and is in daily practice." Now, I need scarcely say that a higher authority than Lord Moncrieff, I believe, does not exist, and that when he treats that as a matter entirely clear, it must be on very strong grounds, indeed, that your Lordships would feel warranted to depart from what is so laid down. I have stated that that was in 1846, prior to what happened two years later in the case of *Cameron v. Chapman*, 16 S. D., 907, because in that case it was held that the jurisdiction did not exist. But why was that? In *Cameron v. Chapman*, there had been an arrestment *ad fundandam jurisdictionem* against a person who, before the case came to an end, died; and the question was, whether that arrestment was sufficient to warrant a transference to the personal representative of the defender; and after a great discussion it was held not to be sufficient, because, though the arrestment *fundandæ jurisdictionis causa* was perfectly good to warrant a jurisdiction against the person whose goods were seized, yet it would be carrying the principle of the Scotch law a step further, to hold that that gave jurisdiction against the personal representative whose goods had not been seized, and therefore upon

distinction, and that distinction only, it was held that the jurisdiction did prevail in that case. These cases appear to me to put the matter entirely beyond any reasonable doubt. Several other cases were cited, but I should be wearying your Lordships by referring to different cases to illustrate the principle. And I shall content myself, therefore, with merely referring what was said by Lord Eldon in *Grant v. Peddie*, 1 W. S. 716, where a different question arose—a question as to whether there was jurisdiction *originis* against a Scotchman, who was born a Scotchman, but who had quitted Scotland permanently, and become resident abroad. Lord Eldon in that case said that there was not jurisdiction; but in the course of the discussion of that case Lord Eldon said, “There is a law in Scotland under which, if the stranger has real estate in Scotland, or if he has goods in Scotland, or if a tract upon which a party sues be a contract formed in Scotland, that, following particular forms, those circumstances would undoubtedly give a jurisdiction to the Court of Session;” of course referring to this very jurisdiction. When we find, therefore, that this jurisdiction has been recognised by text writers of the greatest eminence—by Mr Erskine, and, I believe, in Bell’s Commentaries—and that it has been clearly acted upon from 1758 downwards, as treated by judges of the highest authority (I need not name any other than Lord Moncrieff), upon more than one occasion, as an undoubted source of jurisdiction possessed by the courts of Scotland, and that it was clearly so acknowledged by Lord Eldon, it appears to me that your Lordships would act a very wise part if you were to raise any doubt upon such a question by giving countenance to this appeal. Therefore I move your Lordships that this appeal be dismissed, and the interlocutors be affirmed.

Lord BROUGHAM.—My Lords, I entirely agree with the view taken of this case by my noble and learned friend, that it is impossible for us to doubt the existence of this jurisdiction after the authorities to which we have been referred, and which we have fully considered, consisting not only of text writers, but of decision upon the subject prior to them, because the decision to which my noble and learned friend referred was, as he observed, exactly 100 years ago, before Mr Erskine’s work was published, and before he wrote that passage, and that decision was in favour of this jurisdiction. The cases which have been cited in later times particularly leave no manner of doubt as to what the prevailing, I would say the universal, opinion of the Scotch lawyers is, upon the subject of this arrestment *jurisdictionis fundandæ causæ*. The case of Douglas Jones has been referred to by my noble and learned friend. That case was decided by the court below in 1831. But I refer to the more recent case in 1846, of *Parkin v. The Royal Exchange Assurance Company*, and I refer to it as the reason for which my noble and learned friend referred to it, namely, the clear and unhesitating opinion, or rather I should say, the clear and unhesitating judgment there given upon this subject, by that most excellent lawyer to whose authority this House has at all times been accustomed to pay the greatest respect—I mean the late Lord Moncrieff. Nothing can be clearer or more unhesitating than the manner in which he states this, and treats it as a thing perfectly well-known, acknowledged, and admitted on all hands to be the law of Scotland. The *dictum* of Lord Eldon in *Grant v. Peddie*, is said to have been so far *obiter*, that it was not necessary for him to rely upon it in deciding the case then before him; but, nevertheless, it is of some authority, because it shows that he, with all his great knowledge of Scotch law and his long experience of Scotch practice, took for granted that this was a clear and settled point, and that there was no more doubt about it than about any other of the most certain points and plainest elements of Scotch law. Something has been said about this being a barbarous law. I think there was an old case quoted from Lord Hailes’ Reports, in which it was said that this was a foreign and somewhat barbarous law. And among other grounds of objection taken by Lord Monboddo, a most able and eminent classical scholar, he objected to the barbarous form of the word “*arrestum*.” We do not deny here that it is a barbarous word; but we English lawyers have no

right, Heaven knows, to quarrel with this form of expression, when we remember the barbarous Latin that is used, and used *in pari materia*, namely, to distinguish our process. How can any one object to the words *arrestum jurisdictionis fundandæ causæ* who is accustomed to hear of the writ, "*de essendo quicquid de theolonio?*" I believe Lord Monboddo, if he were to hear that, would rather consider "*arrestum*" to be comparatively a classical word. Upon the whole I am clearly of opinion, that there is no ground whatever for calling this decision in question. A point may arise, but that we are not called upon to deal with here; it may be mooted whether or not the arrestment goes beyond the detention of the goods arrested. In the case that has been put of the umbrella, the hat, and the toothpick, that question might be got rid of by saying, that in that case no harm can be done by the jurisdiction being given, because it is a jurisdiction only over those small parcels of personal property. But I do not enter upon that at all. It is wholly unnecessary for us to decide whether this goes beyond the goods arrested, or the debt arrested, if it happens to be a debt that is arrested. The only question for us to decide is—does *arrestum jurisdictionis fundandæ causæ* exist in the law of Scotland, and where it has been used, does it give jurisdiction? Beyond that it is wholly unnecessary for us to go. I am clearly of opinion that upon the authorities, and above all, upon the authority of the cases to which we have been referred, it has been, for the last hundred years, on all hands acknowledged to be the law of Scotland. In my own recollection, I have often heard the question mooted among Scotch lawyers. Certainly, when the subject has been mentioned, some regret may have been expressed, and some doubt may have been expressed, whether it ought to have been the law, and whether, if it were a question now of introducing it, it would be a law that ought to be introduced; but I have no recollection of ever having heard it doubted that the law has for a century existed.

Judgment affirmed, with costs.

English Cases.

JOINT-STOCK Co.—Contract with Director.—Joint-Stock Companies Registration Act 1845 (7 and Vict., c. 110, s. 29), annuls contracts in which any director of a joint-stock company is either directly or indirectly interested, except a policy of assurance, grant of annuity, or contract for the purchase of an article or of a service which is respectively the subject of the proper business of the company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers. The plaintiff's claim was for commission in respect of various country agencies established by him for the National Provincial Life Assurance Company. The plaintiff was appointed agent of the company for the purpose of establishing provincial agencies, on the terms that he should receive a commission on the assurances they should effect, by a resolution at a meeting of directors on the 13th of August 1851, *himself being at that time a director*. His appointment was not considered or ratified at any meeting of the shareholders of the company. It was contended that his engagement was a contract of service within the Act. Pollock, C.B.—"The object of the enactment is to prevent jobbing, by requiring that any contract with a director, beyond the ordinary business the company transacts with the public, should be sanctioned by the general body of shareholders. It is not correct to say that the establishment of agencies was the purpose of the company: that is only their mode of business. This was therefore a matter within the prohibition and not within the exception." Channel, B.—"I am of the same opinion. I think the section contemplates a contract for a service to be rendered by the company, and not to the company. The words of the exception

'for the purchase of an article or of service.' But then also it is to be 'the object of the proper business of the company,' and on the same terms as other toms; and if it be not of such description, it is to be submitted to the reholders. I think the sort of contract contemplated by the exception is, that the directors may become customers for matters in which the company is, and for which there is some settled rate of charge."—*Rule refused.*—*Bole v. The National Provincial Life Assurance Co.*, 30 L. T. Rep. 260, and W. R. 211.)

CARRIERS.—Railway—Contract to carry beyond the line.—The West Cornwall Railway runs from Truro to Penzance; on the line is the seaport of Hayle, from which steamers go to Bristol, and from Bristol to Wolverhampton goods are carried by railway. The practice on the defendants' line has been, and is, to send goods received at Penzance for Bristol or places above it, and which are specially directed to go by another route, along the whole line to Truro, and then to deliver them to their carriers, who carry them 66 miles, for which distance there is no railway to Plymouth, from whence they are sent by railway to Wolverhampton. The company received goods at Penzance, directed to Wolverhampton, "per first steamer from Hayle." The goods were shipped to Hayle accordingly, and damaged on board. The carriage was not prepaid. The company were found liable—the Court holding the contract to be one to carry the whole way. *Watson, B.*—"It would be monstrous that when goods are forwarded by rail, the sender, in the event of their being lost, should be bound to find out when, and how, and where the loss took place, and who was liable for it. Here there was clearly a holding out. The receiving the goods with a direction that they should be sent to Wolverhampton, was a clear holding out that they should be so sent. Then it may be said that, as to the evidence of payments being made, or to be made, there is nothing stated in the case; but, I take it that the receiver would pay the whole of the carriage on the arrival of the goods at Wolverhampton. If that be so, the case is the same as in *Luschamp v. The Lancaster, etc., Railway Company*; it is immaterial whether the payment be made at the beginning or at the end of the journey; and I have no doubt that this was a contract to carry the entire distance."—(Willy The West Cornwall Railway, 30 L. T. Rep. 261.)

PRINCIPAL AND AGENT.—Undisclosed Principal.—The plaintiff, a merchant in France, employed defendants, who are brokers in London, to purchase a cargo of wheat, then stated to be on board the ship *G.*, on her voyage home. The brokers bought the wheat of *B.*, and informed him that they were acting for a foreign principal, but did not say for whom. The price was paid, and the shipping documents transmitted to the plaintiff, who in turn sent the price of cargo and commission. Subsequently, it appeared that the cargo had been fraudulently sold by the captain of the ship before the contract aforesaid was entered into. The consideration having thus failed, the plaintiff sued the brokers for money paid, on the ground that the transaction was to be treated as a sale between them and him—Held that the remedy was to sue the person whom the brokers had paid the price.—(*Risbourn v. Bruckner*, 30 L. T. Rep. 258.)

INSURANCE.—Abandonment—Freight.—The owner of the ship insured was the owner of the cargo. He insured as freight the increased value of the goods, their being carried from St John to Liverpool. The ship was damaged at Liverpool; part of the cargo was put on board lighters under the owner's directions, and the rest taken with the ship to Liverpool. Question—What is the nature of freight passed to the abandonees? Lord Campbell, C. J.—"If the goods on board the ship, at the time when the casualty to which the abandonment refers occurred, had belonged to third persons, for whom they were carried on freight from St John to Liverpool, there can be no doubt that by law the right to the whole of that freight would have passed to the abandonees of the ship. The abandonees are considered as purchasers of the ship at the moment of the casualty to which the abandonment refers; and although

the contract of a shipowner does not end with the ship, it is well settled that as incident to the ship, the right to the whole freight, pending at the time of the sale and subsequently earned, belongs to the purchaser of the ship.—(*Stewart v. Greenock Marine Insurance Company*, 2 H. L. 169; *Scottish Marine Insurance Company v. Turner*, 1 H. L. 334.) But in the case which we have now to decide, at the time of the casualty, there was no freight pending. The goods in the ship were the property of the owner of the ship; he was carrying them on his own account, and he could have no contract with himself. A purchaser on a sale of the ship, at the time of the casualty, could have had no claim against the vendor, in respect of the goods having been carried in the ship from St John to Southport before the sale. No more can the abandoner. We are, therefore, of opinion, that it is only for any benefit which the owner of the goods may have derived from the use of the ship, subsequent to the casualty, that the abandoners can claim compensation in the nature of freight. But for so much of the cargo as was brought in the ship from Southport to Liverpool, we think such compensation is due from the plaintiff, as owner of the goods, to the abandoners. For the part of the cargo brought by the plaintiff in lighters from Southport to Liverpool, we think no such compensation can be claimed, as this operation was conducted by the plaintiff himself for his own benefit; and this part of the cargo must be considered as finally severed from the ship at Southport. The principle on which the compensation due ought to be calculated, we think is, by considering for what sum the part of the cargo, brought in the ship to Liverpool, might have been conveniently forwarded from Southport to Liverpool in another ship, according to the current rate of freight, which is to be adjusted by an average settlor, according to the agreement between parties.”—*Judgment accordingly*.—(*Miller v. Woodfall*, 30 L. T. Rep. 240.)

JOINT-STOCK CO.—Liability of the Representatives of a Shareholder.—Statute 7 and 8 Vict., c. 113, s. 21, enacts, “That the persons whose names shall appear from time to time in the then last-mentioned memorial, and their legal representatives, shall be liable to all legal proceedings under this Act, as existing shareholders of the company, and shall be entitled to be reimbursed, as such existing shareholders only, out of the funds or property of the company, for all losses sustained in consequence thereof.” The name of a shareholder in the Royal British Bank appeared on several memorials, the last of which was one filed June 1856—when he was dead. The plaintiffs, judgment creditors, sought to issue execution against the executors. It was found that they were not liable. Cockburn, C. J.—“I am very far from saying, that the effect of this Act is, that the estate of a shareholder is only liable during his life, and that his estate after his death is not liable. It is not necessary to decide that. My impression is rather the reverse, namely, that looking at the 21st section, when a person is a shareholder, and his name is in the memorial, in the event of his death, his representatives are liable. But in this case I think the defendants are not liable. I think the word ‘and’ preceding ‘their legal representatives,’ in the 21st section, cannot be read in the disjunctive. Walton died before his name was put upon the memorial, and he never could have been proceeded against. And therefore I think his legal representatives cannot. I think it was not intended that where he could not, they could.”—(*Powis v. Bather*, 30 L. T. Rep. 259.)

PROMISSORY NOTE.—Material Alteration.—A note for L.3000 was granted by three parties. Some years after, when the holder demanded the money, he was induced to grant further delay, on the makers procuring the name of another party as an additional security. The signature of this person was not endorsed on the note, but was written on the face of it, at the left corner, opposite the names of the makers, thus—“R. Russell, 29th Sept. 1856.” The Court of Appeal reversing the decision of the Commissioners in Bankruptcy, held that the additional signature operated as an indorsement, and consequently that the note was not invalidated.—(*Ex parte Yates re Smith & Co.*, 30 L. T. Rep. 282.)

THE

JOURNAL OF JURISPRUDENCE.

FEUDALISM.

To meditate, idle, and dream, may be very proper occupation for the creatures of mythology, but ever since the first human pair were ejected from paradise, it has been the allotted duty of their children *to fight*. Outside paradise, stubborn and rebellious things existed *for them* to subdue: woods, morasses, wild beasts, the winds and the seas, waited for slavery or extermination. So far it accords with the highest nature and destiny of man to be a warrior,—to struggle with the brute and physical forces of a world full of evil, ready to give place to good, and intended to nourish the “discontent which is his immortality,” and educate him to duty and virtue. Over the fighting instinct of man it is needless to raise howling lamentations; for, as nature is constituted, he could not have kept any place in nature without it. The best he can do is to guide it aright,—to *know* that he has discovered his true enemy, and not to attack where he should seek an ally. In savage and barbarous epochs, man, to a certain extent, wants this necessary knowledge. The family, which is the simplest germ of society, is not often divided against itself, nor the tribe. The helpfulness of man to man is soon learned within these narrow limits, as well as the superiority of one to another in strength and other characteristics. But the idea that all mankind are one brotherhood grows very slowly, and there is no spreading it scarcely among barbarians except by violence,—by Roman swords or British bomb-shells. The savage tribe, knowing only of a small flat world, girt by the next mountains or some great impassable sea, had a selfish desire to keep all the corn and hunting fields to itself, and to live, like the German nations conquered and slightly enlightened by Cæsar, within a ring of desolation peopled by the beasts of the chase. To its ignorant selfishness the neighbouring tribe seemed its “natural enemies,” and between the two there was unceasing war, until some more powerful assailant came unexpectedly from a distance to attack them both, and common calamity made them friends and the nucleus of a kingdom. So, out

of ignorant selfishness and rational self-defence, war shaped itself into the ruling idea of the unwise, uncivilised races. Each tribe or clan needed a leader in battle, who did not vacate his place in peace. Personal strength was necessary to attain his position, and prudence or craft to keep it. He had to be strong, energetic, and scheming in war, and not very unjust in peace, as his life and position were not secure among armed men, where revenge is the first rude outcome of justice. On the part of the leader or chief, there was expected and afforded protection, leadership, and bread; on the part of his followers or vassals, service and devotion. Absolute power, or the power of the majority, enforced the one part of the contract; but the part favourable to the vassal was imperfectly enforced only by generosity, a sense of natural justice, or the fear of assassination.

War, which had called into existence the relation which subsisted between the feudal chief and his followers, afforded the means also of maintaining it. Whatever was taken by violence was the reward of the vassals: corn, cattle, martial weapons, women and children for slaves, were divided among them in some rude and ready way: and when pastoral and agricultural epochs had begun, tracts of land also were seized and divided. Since land is permanently valuable, it is in the seizure and distribution of it that feudalism has left that most enduring record of itself, to which history gives honour, and the figure of which law has embalmed and preserved as a mummy in a great deal of parchment.

Like every other ancient system, the feudal system of warfare and plunder improved in the course of ages, though the original principle of it could not alter. Feudal lord and vassal never doubted for a moment the divine right of brawny muscles and cold steel, or were troubled with fine fancies about man's rights being greater than his fighting powers. They believed in the right of the strongest, and observed with Napoleon, though in a less distinct and scientific manner, that Providence is always favourable to strength. But uncomfortable feelings of uncertainty led them to wish for a change. There was small inducement to sow corn for others to thrash or burn, or rear cattle for others to drive away and eat. Could they not unite under some more powerful chief, who would give them a sort of security at home, and leave a part of the tribe to plough and attend to agriculture with the women, and lead the young and the robust to fight for glory and plunder in some country at a comfortable distance? And the answer to that yearning after security from the fear of violent death or starvation, was the election of kings—first for a season, temporary dictators, then for life, and then hereditary. Dissatisfaction with uncertainty operated downwards as well as upwards, and imposed upon chiefs hereditary vassals as well as hereditary kings. The vassal cultivated his field the better, and built his cottage the firmer, that he knew he was not to give it up to another in a year, and that it was to pass to his children after

him. His chief discovered the expediency of employing him to dig and plough when he was not fighting. New ideas of value crept into the feudal mind, and the material of war began to appear not the only article of value. The feudal lord found himself at court a peer, desirous of splendour suitable to his supposed rank, and the use of money dawned upon him as a new revelation. Fighting and ploughing vassals were good, but vassals who could supply him with money would be a blessed contrivance. It was a contrivance which took the life out of feudalism.

Springing from the warlike instincts of man in barbarous ages, it is vain to predicate of feudalism that it took its origin in any single country, or at any particular time. We can understand the conditions under which it struck root, flourished, and began to rot at the core; but these conditions are universal at a certain stage of civilisation: so, wherever we have that stage of civilisation, we may safely assume that feudalism existed and helped society forward to another stage, although history had no witness then to note the fact; for it is not more impossible that the butterfly should miss the chrysalis state of development, than that society should miss the feudal state. In the dawns of history we have many glimpses of it. Job, the hero of the grand sacred epic, is an eastern chief plundered of his cattle and sheep by marauders. Abraham is the head of a warlike pastoral tribe; and the ten sons of Jacob are the heads of the ten tribes of Israel, who had a divine mission to drive out other tribes, and possess themselves of Palestine. Homer's Grecian heroes are but petty feudal chiefs, who have elected Agamemnon as their king *till* Troy be taken, and whose rule is as troubled as is conceivable for any rule of this temporary species over men unused to subordination. In Hindostan the relation of chief and vassal has subsisted for thousands of years, and obtains recognition in the code of Manu, who, in the beginning of time, had his system of civil and religious law revealed to him by Brahma, as all pious Hindoos profess to believe. The feudal tenure of all land in India from the crown is mentioned by Strabo,—*ιστι δε η χώρα βασιλική πασα*,—and has been insisted on by modern Hindoo lawgivers, but it is not mentioned in the code. The English Blackstone has remarked the resemblance of the relations of vassal and lord to that of client and patron among the Romans; and the German Niebuhr acknowledges the resemblance, and descants upon it at length, but, with his partiality for everything Roman, maintains that the Roman relationship was more firmly founded upon friendship, feeling, and conscience, than the feudal. To our judgment, the relationship was the very same. Whatever noble and moral element might enter into it, was due to the character of the people; and be it from national bias, or for better reason, we incline to the belief that the devotion of the clansmen of the Scottish Highlands was not second in any respect to that of the clients of Rome. The nations of Gaul and Germany, which Cæsar subdued, were warlike and predatory

tribes, fighting with each other under chiefs, and hunting, not allowing individuals to retain possession of land, lest they should become addicted to agriculture. These Germans had not altered much, when Tacitus, in his historical account of them, sets their hardy virtues in bold contrast to the effeminacy and vices of his countrymen, who were, in his day, calling down the doom of Rome. All that is distinctive in the relationship of vassals and chief (*comes et princeps*), catches a glow from his poetic mind,—their sacred obligation to him, *præcipuum sacramentum*; his desire to surpass them in valour; their desire to equal him; the disgrace of surviving him should he fall; the plunging of a coward “deserter of his chief-tain’s trust” into a bog with a hurdle above him; the necessity of the chief engaging in war to maintain his train of attendants at a full table, and their aversion to earn by sweat what they might hope to gain by blood. Montesquieu, in his “Spirit of Laws,” and Dr Robertson, in his “Charles V.,” record, that they see in this passage the origin of the feudal system; and a great many persons versant in law have seen it there too—through their eyes. But Dr Robertson finds that Charlevoix observed a similar state of society among the North American Indians (though somewhat ruder); and observes, that “the human mind, whenever it is placed in the same situation, will, in ages the most distant and countries the most remote, assume the same form and be distinguished by the same manners;” and yet does not permit himself to doubt, that the “singular institution” called the feudal system was “formerly unknown,” though it is clear that the nomenclature alone was new to Europe, and of German origin. Modern comparative philology has rendered it almost certain that the cradle of the Indo-Germanic races was in Asia (even if there were no other authority); and it is undoubted that early migrations always were conducted by leaders,—so that, before the Germans reached Europe at all, they had marched under that not “singular institution.” Gibbon remarks its existence among the Tartars and Scythians. Indeed, it would be difficult to tell where it has not existed, and all controversy or dogmatic assertion as to its origin can yield no positive result. We are eager to reach the beginnings of things, but almost always baffled.

Baffled we shall be if we seek to ascertain its origin in Britain, or to deny that it existed before the invasion of Cæsar among the barbarous tribes who opposed him, and that it was the system of government among the fierce Caledonians who, under Galgacus, with their broadswords and bucklers, met the legions of Agricola at the Grampians. In Britain many of its phases co-existed; and long after the majority of its inhabitants had settled down to agricultural and commercial pursuits, there were bands of robbers or marauders driving off cattle and whatever else they wanted. Grave history discovers no virtues in these, and is well pleased to see them hanged on a border gallows. They lived a little too late; but their moral code was not substantially different from that of the most conspi-

cuous robber and feudal lord who ever appeared in England, and who, in respect of his success, escaped hanging, and is styled William the Conqueror. He came over from Normandy with a few boatfuls of dirty Norman thieves (who, happily for their proud descendants, are all satisfactorily dead and rotten a considerable while ago), and having conquered the English in the bloody battle of Hastings, and slain almost all the English nobility, or hunted them down afterwards, he divided their lands among his followers, by the light of the Domesday-book, into fiefs or feus, on the condition of faithful service at home and in war. The survivors of the English nobility, who could venture and would, received their lands on the same condition of doing homage and fealty to the Conqueror's person; and so, according to Macaulay, the inhabitants of England were, for the first time and for ever, united into one powerful and congruous whole. In history there is no better example of the construction of a state upon feudal principles, since it exhibits the seizure of the land by violence, the distribution of it among warriors who bound themselves by oath to give martial service for it, and they in their turn dividing it among their fighting vassals, who were to live under them as serfs.

Once constructed, it began to decay under the influence of civilisation. War began to be looked upon rather as an uncomfortable necessity than an exciting and glorious amusement, and the business of thieving became flat, stale, and unprofitable. The holders of fiefs would rather give a compensation in money than knight-service as soldiers; and the kings accepted of *scutagium*, or *escuage*, and hired troops. Parliament was invented, as the nobles struggled to an equipoise of power with the kings; and having grown to grudge the exorbitant *escuage* levied by the kings, they obliged simple King John, when he was granting the Magna Charta, to agree that no *scutage* should be levied without the consent of Parliament. The towns again, which had nestled for protection under the feudal castles, and paid tribute to their owners, grew populous and rich through trade and commerce, and able to protect themselves, and therefore unwilling to pay an inconvenient amount of tribute. They were and are the centres of the political life of a commercial era, which has slowly pushed aside feudalism in Britain, and superseded it. Commerce is hampered in her work amid fortifications. Freedom, not protection, is what she most requires. What mockery now to expect or pay for the protection of a feudal superior, when the equal laws of our country afford protection to all alike! In Scotland this is felt, as well as in England; for it is patent to all that Scottish feudalism is defunct too, though it was terribly tenacious of existence amongst the Highland clans. Having existed in a wild, lawless, spasmodic fashion, from before history, through hundreds of years raids and battles, through Otterburns and Floddens, it received its death-wound on Culloden Moor. Thenceforth it has been the business of legislators and lawyers to bury it quietly and

without indecent haste—its remains being carefully preserved in dressed sheepskin. The obsequies are a little tedious, we venture to submit, and somewhat of an eyesore to modern industry. Yet we venerate the memory of feudalism. Let its grim picture hang on the wall; its rusty sword be viewed with reverence; and its old castles, slowly decaying, stand to attract the poet's eye, and testify of the stout hearts and hands of our fathers.

Sir Thomas Craig has considered the epoch when feus were precarious the *infancy* of the feudal system; the next epoch, when they were for life, its *childhood*; and the next, when they were made hereditary, its *manhood*. We follow out his metaphor, and note that the barter of warlike for agricultural services was the act of *senility*, lazy, and detesting trouble and personal discomfort; that the receipt of money for feu-holding was *decrepitude*; and that the legislative abolition of ward-holding, or holding on condition of military service, was *death*. Fixing 1747, when the Act 20 Geo. II., cap. 50, converting ward-holding into blench or feu-holding, came into force, as the date of the extinction of vitality in Scottish feudalism, we shall look back from that date, to observe how it grew decrepid and weak in the presence of commerce and commercial ideas and wants; and forward from that date to its said obsequies, which have been performed, or need to be; and, in doing this, we must spare metaphor, which, in matters entering directly into professional practice, is as great an encumbrance as feudal forms and symbols themselves, though useful, like them, for vividness and assisting the memory.

The decay of feudalism was inversely proportional to the growth of civilisation. The one disappeared before the other, in Scotland and elsewhere, as night vanishes before the sun. Many of the barbarities, and much of the injustice of Scottish feudalism, needed no statute law for their removal. Men with human feelings, and the sense of right and wrong, grew ashamed of them, and they sunk into disuse. Among the last of these, and one suggestive of others of a kindred but more odious complexion, was the casualty of marriage, which entitled the feudal lord to provide partners in marriage for his male and female vassals, as if they were slaves or cattle; and afterwards, when modesty began to blush in the rude faces, to exact a fine if the partner was refused. Forfeitures for disclamation or disowning the chief, and purpresture or invading his rights, were obtained in the chief's own court, and, no doubt, considering its constitution, with reference only to the will of the chief. They too are obsolete; and the casualty of escheat, conferring the right to usufruct of a rebel vassal's estate, and to succeed as *ultimus hæres*, was swept away with ward-holding, the Crown being now *ultimus hæres* of all subjects. The feudal superior's casualties are now entirely of a commercial character, and capable of being valued in money; so that, in the single substantial matter of value, feudal law is merged in commercial law. Indeed, ever since ideas of value,

altering gradually from barbarous times, introduced the sale of land for money, that transaction was in its essence commercial. In its form it was feudal, because the possession, in theory or in reality, required the continual protection of the superior's sword. Along it lay the true *dominium directum*, though a fiction of law applied this term to a residuum of property supposed to be left in the superior, after the vassal had obtained the *dominium utile*, which is all that any man can in fact possess. In this possession the vassal has been long protected, not by the superior, but by the equal laws of his country; so that, in truth, the only feudal superior in the Lowlands of Scotland, for centuries, has been the Crown; that is to say, the Crown is the only power which has protected the vassal's property, and is, therefore, the only superior whose oversight is worthy of being recognised and paid for. To give practical effect to this obvious truth, and make the Crown the only feudal superior, has been the result of commercial principle acting upon Scottish feudalism. Of old the feudal lord had choice of his vassal, and rightly so; he required to look to his fighting capabilities; but the money of all men being alike (if punctually paid), law has gradually taken away the feudal lord's right of choice. First, he was bound to receive a creditor who had attached the vassal's possession (under 1469, c. 36); next, he was bound to receive a purchaser, on his vassal's "resigning in his favour" (under 20 Geo. II., c. 55); and again (under Lands Transference Act of 1847), he is compelled to ratify his vassal's disposition *a se de superiore suo*, by charter of confirmation, which was formerly his voluntary act; so that, under stress of necessity, he puts his hand to forms which have the resemblance of free-will in a manner highly absurd, even in an ultra-Calvinistic country.

Nor is the vassal free to play fast and loose with his obligation. The ancient theory of feudal law seems to have been, that he could break it when he pleased (only, of course, he ran the risk of being hanged on some convenient tree); but, in spite of the earnest and learned protest of Lord Balgray in support of this theory, the twelve other judges of the Court of Session decided (in *Hunter v. Boog*, Dec. 16, 1834), that, according to "the general understanding of the country," the vassal who had accepted of a feu charter, and entered into possession, could not refute his *feu invito domino*.

As it now stands, the relation of superior and vassal is a commercial relation; and it ought to exist only if consistent with commercial principles, or be ended in conformity with such principles, by allowing the superior a just equivalent in money value for his casualties of relief, composition, and for small or nominal feudalities, and freeing the vassal for ever of all formal and useless acknowledgment of him, and, in like manner, freeing him of all formal and useless acknowledgment of the vassal. If it were made legally competent for any purchaser or proprietor of land to apply at once to the Crown, as the feudal superior of the country, for

confirmation of his rights, and obtain confirmation on showing to the Court of Session that he has satisfied the just claims of all other superiors, we should have everything that can be desired in the way of reform; and the fundamental principle of the feudal system would still remain intact, as the Crown would continue to be the feudal superior of all the lands of the realm. Besides, the system would be restored once more to consistency with fact and reason, for the Crown is the only feudal superior capable of discharging the feudal superior's duties of protection of rights.

However, it is not necessary, or perhaps expedient, that those superiors now holding directly of the Crown should be displaced; but the practice of subinfeudation, with its expensive twisting into ropes of sand ineffectual superiorities and vassalages, has survived all reasonable human patience. In fact, considered well, it never had reason in its favour. It grew out of the foolish desire of men to possess the shadow of property, and the foolish tendency of men to do the same thing over and over again, from habit or example, without thinking about it, or from some meaner tendency incident to monks and lawyers not overburdened with work. It has been supposed that subinfeudation was part of the true feudal or military system; and it is stated, on what authority we have been unable to discover, that "a descending array of subordinate feudatories was an inherent characteristic of the system" in Scotland. It strikes us that the reverse was the fact, and that, under the feudal lord, who held directly from the Crown, there were no inferiors except his own tenants and vassals living under him *without* any written feudal title. Duke, marquis, count, and baron, held degrees in rank as they do still; but the one did not necessarily come between the Crown and any other; all held land directly from the Crown. A structure of so rude a character could not consist of many tiers. It strikes us, further, that subinfeudation has been, from first to last, a mere matter of penmanship, parchment, and mummy wrappings, without any practical utility whatever, without any merit to plead for its perpetuation in a practical and industrious age. So early as 1290, by statute of Edward I., *Quia emptores terrarum* subinfeudation was abolished in England; and it is said to have been done in Scotland by an act of Robert the Bruce, modelled on the statute of Edward, which, from some cause or other, was inoperative, though it would have kindled the indignation of that Scottish monarch, with his direct battle-axe order of intellect, to foresee his countrymen striving for five hundred years, by oblique methods of *resignatio in favorem* and confirmation, to accomplish what he had no doubt learned during his English sojourn to consider plain and simple.

Descending still deeper into the practical, we have to submit that the instrument of sasine and charter of confirmation are useless documents, and therefore not indispensable. Once the feudal lord in person, with his own hands, pointed out to the vassal the property that was to be his, and gave him possession, in presence of his

eers, by handing to him earth and stone of the land, or some appropriate and significant symbol. Their memories were the only register of sasines in these early days; and the passing to the lands, and giving symbolical possession (actual possession never could be given, owing to the physical difficulties of laying hold of land *usque intro ad cælum*), fixed their gaze and impressed their memories. After he had become too dignified to introduce his vassal in person, bailie was commissioned to discharge that function; and he did by passing to the land, and giving symbols before all interested in such a ceremony; and the custom was useful, so long as there was no register of sasines. But no sooner were sasines registered—when they began to be two hundred years ago—than the giving of sasine on the lands became useless, for the registration alone had efficacy. That fact was discovered in the course of that two hundred years, and the discovery lately passed into law (8 and 9 Vict., cap. 31). Sasine is now given on *production* of the disposition to a notary; and the notarial instrument of sasine, certifying, after the old form (modified), that it has been given, is little else than a tedious and expensive falsehood. The disposition of the seller contains the warrant to infest—i. e., the warrant to do nothing—which being duly done, the notary celebrates this important historical fact in the instrument of sasine; and it is recorded in the Register of Sasines, to show the state of possession. Now, it appears to us that the do-nothing warrant and the notarial history are both wasteful expenditures of paper and of human industry. The fact of consequence being, that the sale has taken place, and the document of the sale being the disposition, why not register it? Why not? And why not? Indeed, it would be difficult to answer that question in any rational manner. The inertia of society is very great. Yet sasine is already abolished on heritable securities.

Confirmation, too, was no doubt once a grand ceremony—the voluntary reception of a new member into the brotherhood of vassals, for one who had seceded; but now it has come to be the thing in a clumsy way, under compulsion, what there is no escape from. For all parties, it would appear that the easiest and shortest manner of doing this is the best; and, accordingly, the charter of confirmation has been much shortened; and we have to expect that confirmation will be nothing longer than an indorsation of the disposition, or a postscript to it, or something of that brevity. Let Alexander Mattock, vassal of Abraham Trigger, Esq., if he please, dispose his field to John Spade; and let Spade go with the disposition in his favour from the said Mattock, and have it indorsed (in the presence of witnesses, if need be), “Confirmed by me, Abr. Trigger,” and let him have his disposition, thus confirmed.¹

¹ We do not forget Lord President Blair's doubts about confirmation anterior to sasine, in *Adam v. Drummond*; but we think it better that the title should be complete before it be registered.

recorded in the Register of Titles, which was formerly the Register for Sasines only; and everything will be done necessary for the welfare and security of these three worthy gentlemen.

Our measure of reform, promised by Lord Advocate Inglis, for the transfer of land, would, we submit, require to effect at least three things:—

(1.) Power to a proprietor, by purchase or otherwise, to pay off the claims of mid-superiors, and obtain confirmation from the superior who is immediate Crown vassal; payment of claims being made according to a statutory composition, as in the case of teinds and thirlage, conversion of ward-holding into feu-duty, and of enfranchising English copyholds.

(2.) The abolition of the instrument of sasine, and the registration of dispositions in the Register of Land Rights.

(3.) The abolition of the charter of confirmation, and the confirmation by the superior, by indorsation or by a brief postscript to the disposition prior to registration.

And ask some, "Having *once* obtained an accurate description of the property in the disposition, why not transfer it from one person to another by indorsation of the names of the owner and the superior, and registration of the transfer, in like brief fashion, in the Register of Land Rights?" We are not able to foresee all the consequences of such an easy transfer of land; and as there is no urgent reason for it, there is no need to risk unknown evils for an unimportant and doubtful good. But some such ready mode of transfer—readier, if possible—was favourably spoken of by Sir Fitzroy Kelly and Lord John Russell at the late Social Science Congress at Birmingham, large and accurate maps of the country being in a measure to supersede the necessity of description, and other machinery being to be established for which we have equivalents in Scotland already.¹ It is a wise principle in legislation, never to introduce any change until it be clearly necessary; and, to the best of our judgment, it appears that the three changes indicated above are all that are at present clearly necessary, and that with them the transfer of land in Scotland would be sufficiently cheap, safe, expeditious, and in every way reasonable. There is no reason for destroying the hoary traditions of feudalism, where they do not encumber, in the spirit of Goths. They are venerable for their antiquity, and they have served modern civilisation well. For it they held the past together when they were realities; for it they have prepared the present, with all its elements of self-gratulation.

¹ See Transactions of the National Association for Social Science, just published, pp. 73 to 91.

ON HEARSAY EVIDENCE.

THE patient and persevering few who read the modern Reports, must be painfully alive to certain peculiarities which distinguish them from the earlier issues of the series. Some of these arise from their more elaborate structure; whereby, in the over-zeal of the reporters, the law for which they are consulted is buried beneath a mass of irrelevant facts. Others proceed from a growing disposition on the part of the judges, to rest their decision less on the abstract and well-ascertained rules of law, than the specialties of each case. The calamitous results of this system are most strikingly observable in the law of evidence. In no department of our jurisprudence could the technical rules of law be more jealously guarded; they are the tests provided for the detection of error, which give to a judicial inquiry its highest value. If, however, in every case principles are to be frittered away, to meet what is called "the substantial justice of the case," our law of evidence will be utterly destroyed. True, its rules, as now understood and practised, are not of very ancient growth; the combination of the functions of judge and jury, which has always characterised our civil procedure, has been unfavourable to their development. For this reason, perhaps, there has always been too great a disposition to treat evidence more as a matter of *practice* than *principle*. The time has come for a reaction in this respect; and chiefly to be reprobated, is our *mala praxis* in regard to Hearsay.

Excluding principles affect either the competency of the witness or the competency of a particular part of his testimony. As the competency of witnesses, we have no fault to find with the more enlightened and liberal views which have resulted in the abolition of all those grounds of exclusion which arose from interest, malice, animosity, etc. When every man's evidence was made available in his own cause, a new source of light was opened; and any danger arising from the interest of the witness, was avoided by reducing the absolute incompetency to a mere question of credibility. When the sources of information have been thus multiplied, it is of all the more importance that the judge should exercise his right to reject evidence calculated to confuse and mislead.

For the protection of juries in this respect, we have received the rule on the subject of hearsay. The rule began to be systematically acted on in England only about the end of the last century. The State trials down to the year 1790 are full of examples of testimony which should have been rejected as the mere echo on oath of statements unsworn to, and uttered in the absence of the parties. In this country, its introduction (or rather the intelligent apprehension of its application, if it ever has been fully comprehended) seems to have been still more recent. So late as the year 1811, we find that Lord Mansfield, in the Berkeley Peerage Case (4 Campb., 401),

thought it right to say : " There is not an appeal from the neighbouring kingdom of Scotland, in which you will not find a great deal of hearsay evidence upon every fact brought into dispute. This has struck many persons as a great absurdity and defect in the law of that country. But the different rules which prevail there and with us, seem to me to have a reasonable foundation in the different manner in which justice is administered in the two countries. In Scotland, and most of the Continental states, the judges determine upon the facts in dispute, as well as upon the law; and they think there is no danger of their listening to evidence of hearsay, because, when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve." Examples of this are abundant in the famous Douglas cause, where all sorts of gossip and hearsay seem to have been freely admitted. Still later—in the year 1830—we find this laxity of practice again made the subject of very serious observation in the House of Lords. In *Morton v. Hunters and Co.* (4 W. S., 379), their lordships are at pains to point out certain irregularities which had occurred in the case. The Lord Chancellor says, " They allow one man to say what he heard another tell him, which is no evidence by law—that man being alive, and producible as a witness ; and even if he were dead, it is no evidence, because it is too particular on the question of reputation. In another case (and I observe upon this, not from the vain desire of carping at what has been done by the Court below—which is not a decorous proceeding in any court—but I say it with the practical object, as far as my suggestion can have any weight with those learned persons who superintend such proceedings, of entreating their attention to a stricter enforcement of the rules of evidence below), not only is one man allowed to tell what another man said—not upon oath—but what another man told him of the contents of a letter, which letter has not been produced in Court, and, in fact, was not seen by the person who swore he heard another tell of its contents. My Lords, I do hope and trust, that those learned persons who superintend the taking of proof in the Court below, or, at all events, those learned judges before whom the proof so taken by commissioners from time to time may come, will consider the fearful consequences to the lives, to the liberties, to the properties, to all the most valuable rights of the King's subjects, of opening a door in judicial proceedings to hearsay evidence, which never can be safely trusted, and which, if allowed to enter into the mind of either judge or jury, must of necessity be fatal to the administration of justice." These repeated warnings, coming from so high a quarter, have not been without their influence upon our later practice. The province of judge and jury is now better defined than it was twenty years ago ; but it must be confessed that in this country the subject is still indifferently understood.

In dealing with evidence, the one great and universal principle to be kept in view is, that the only proof which can be received is the best evidence of which the case will admit; i. e., that no evidence is admissible which supposes the existence of still better behind it. The best evidence on which the mind can pronounce a judgment, is the evidence of our own senses; the next best, is the direct testimony of those who saw the deed done, or who can speak from their own knowledge. The distinction between primary and derivative evidence is often misunderstood. It does not affect a witness's means of knowledge, provided the knowledge is his own. If an assault is witnessed by a man at a distance, his evidence may not be as satisfactory as the testimony of the person assaulted; but in both cases the evidence is direct, and immediately connected with the act; and if the person injured were not himself produced, his absence would only be matter of observation to the jury (Best, Pr. 07). To deprive evidence of the character of primary, it must be dependent on and derive its force from some other fact which is not proved, or the truth of which is assumed. Flowing from this cardinal canon, these three consequences are to be observed—(1.) Neither judge nor jury can act on their own knowledge; they must assume nothing which is not proved, or, as the rule is expressed, *Non refert quid notum sit judici si notum non sit in forma judicii.* (2.) The proof must be pertinent to the issue—in *jure non remota causa sed proxima spectatur*; that is to say, that the facts sworn to must have some bearing on the matter in issue. The connection need not necessarily be immediate, but it must be obvious and feasible—either sufficient proof in itself, sufficient if confirmed, or adequate for the purposes of confirmation. (3.) *Melius est petere fontes quam sectari rivulos*; i. e., the evidence must not be secondary. No court of law will be satisfied with parole proof of a written document, if the original can be produced; and none such is receivable till its non-production is satisfactorily accounted for. Evidence of what a person said can only be taken from his own mouth, and not through the instrumentality of others.

It is with the last only of these rules that we have now to deal—that, namely, which renders all hearsay evidence absolutely inadmissible. The term is applied both to that which is written and that which is spoken; but, in its legal sense, it is confined to that kind of evidence which does not derive its effects solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness may have received his information.—(1 Phil. 187; 1 Greenleaf, sect. 98; Roscoe, Cr. Ev. 22.) The reasons of the exclusion are obvious. "If," says Mr Justice Buller, "the first speech were without oath, another oath that there was such speech makes it no more than a bare speaking, and so of no value in a court of justice." The testimony is presented in a form that makes the application of the usual tests impossible. It opens a wide door to fraud. The

original statement is made not under the sanction of an oath, and the party who made it is not liable to the pains of perjury. There is no opportunity of cross-examining the witness as to his opportunities of observation, accuracy of perception, the strength of his recollection, and the many other circumstances by which the weight to be given to his story can only be appreciated. In the ordinary case of direct evidence, there is only one source of error—the credibility of the witness. Where the proof is indirect or circumstantial, the jury may err, both in estimating the weight to be given to the statements of the witnesses, and in drawing the inferences to be deduced from the facts sworn to. Were hearsay evidence admitted, these sources of error would be multiplied to three in number—error on the part of the maker of the original statement; error on the part of the person by whom it is repeated on oath, either wilfully or by misapprehending the meaning or the application of the expressions employed; and error with respect to the conclusions to be deduced from the whole. For these and other reasons, the law of almost every country has required, that nothing said by a person is receivable in evidence, unless said on oath and in the presence of the parties.

What are generally termed exceptions to this rule, are really not so. Words spoken by another person, when not on oath, are often given second-hand; but though this evidence is of the nature of hearsay, the subject-matter of it, in point of fact, is truly original. The fact here in controversy, and the only one to be proved, is not whether the words were actually true, but whether they were actually used. Thus, the prevalence of a rumour may be established by the evidence of those who heard it, in order to show its general currency. So also, questions of general reputation and reputed ownership can only be proved by evidence of a secondary character. The replies given at the dwelling-house of an absent witness to inquiries made for him, are also admitted; for the examination of the witness who gave the statement would add nothing to the credibility of the explanations of his absence which might be given.

This evidence is also largely resorted to in questions of pedigree and legitimacy, where it is of the highest importance that the terms on which the party was treated by the other members of the family should be ascertained. "If," says Lord Mansfield, "the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate." You can therefore prove the expressions of affection, etc., which were used towards him—produce entries in the family Bible, the recitals in deeds, engravings on rings, and such like. In one English case of this kind, the court admitted the declarations of a deceased lady, as to what had been stated to her by her husband during his lifetime. In all such cases, it is no part of the inquiry to ascertain the grounds on which the rumour proceeded, or the reason of the expressions

said to be employed. Their existence or use as matter of fact is the only question before the court; and the evidence, therefore, admitted to prove them may, in this respect, be said to be original. Thus, in *Hatton v. Pedie* (5 Mur. 156), the report by an architect was admitted to prove that he made such a report, though it was no evidence of the facts therein stated.

A second exception to the general rule makes hearsay evidence competent, when it tends to qualify, illustrate, or explain some fact material to the issue. To find out the character of transactions, it is often necessary to inquire what was said as well as what was done by the parties. The words spoken are then said to be part of the *res gestæ*, and so not hearsay. To prove that a dangerous mob assembled is nothing, without also showing its character and purpose, by evidence of the cries which came from the crowd. So, in cases of conspiracy, the act of one of the party, if it be done in furtherance of the common design, is the act of all: therefore, the language used by one of the conspirators, either in conversation or correspondence, if accompanying and explaining other acts, may be put in evidence against the other conspirators. "But where words or writings are not acts in themselves, but a mere relation or narrative of some part of the transaction, or as to the share which other persons have had in execution of the common design, the evidence is not within the principle above mentioned; it altogether depends upon the credit of the narrator, who is not before the court, and therefore it cannot be received" (1 Phil. 160). This principle seems to deprive the case of *T. Hunters and Others*, 1838 (see Rep. 76), of whatever authority it may be entitled to. Here the judges differed as to whether a witness should be asked if a person, not before the court, had said he received a reward of L.15 from the association. The words were neither part of the *res gestæ*, nor spoken by a fellow-conspirator of the panels, and the question was clearly incompetent. In some cases, the expressions which escape a person in circumstances showing them to be an accurate manifestation of the feelings, bodily or mental, which accompanied a particular fact under inquiry, are also admitted to prove its character. Thus, the language used by a person in leaving his house, may be material in a question as to a change of domicile, or the like. "It is every day's experience," said Laurence, J., in *Aveson v. Lord Kinnaird* (6 East. 188), "that what a man said of himself to his surgeon, is evidence to show what he suffered by an assault."

When declarations or admissions are offered in evidence, the material question is one which it falls upon the judge to determine, —viz., whether the words are so intimately connected with the act as to be properly available for explaining its character. They need not be contemporaneous with it, but the connection must be intimate and obvious. If a man finds another wounded on a road, who tells him he has been assaulted and robbed, and points out the direction which the robbers took,—if the man overtakes and apprehends them,

—the statements of the wounded person may be repeated by the person who went in pursuit, to explain the reason of his going. So, in every case where policemen are examined as to the apprehension, the question is put, "In consequence of information you received, did you do so and so?" "Thus we have seen that there are four classes of declarations which, though usually treated under the head of *hearsay*, are in truth *original evidence*,—the first class consisting of cases where the fact that the declaration was made, and not its truth or falsity, is the point in question; the second including expressions of bodily and mental feelings, where the existence or nature of such feelings is the subject of inquiry; the third consisting of cases of pedigree, and including the declarations of those nearly related to the party whose pedigree is in question; and the fourth embracing all other cases where the declaration offered in evidence may be regarded as part of the *res gestæ*. All these classes are involved in the principle of the last, and have been separately treated merely for the sake of greater distinctness" (1 Greenleaf, sect. 123).

There is a material difference between the practice in criminal cases of the Scotch and English courts, with respect to statements made *de recenti* by the party robbed, assaulted, etc. With us, secondary evidence is freely admitted to prove the whole particulars of the story of the injured party in all its details. "Such expressions," says Mr Dickson, "being the natural outpourings of feelings aroused by the recent injury, and still unsubsidied, are a consequence and continuation of the *res gestæ*, and corroborate the party's evidence for the Crown; while, on the other hand, a discrepancy between his sworn testimony and his statements recently after the alleged offence, is a favourable circumstance for the prisoner" (1 Dick. 63). The cases show the meaning which is to be attached to the expression *de recenti*. Statements made by a person robbed to a party whom he roused in bed an hour after the occurrence, or to a policeman who went in pursuit, have been admitted. But the court has rejected similar evidence with respect to declarations made five or six hours after the alleged robbery (Meran, 1 Sw. 231). In cases of rape a considerably greater latitude is allowed. Complaints made by the woman at intervals of two days (Grieve, 1833, Bell's Notes, 288) and of nearly a month (M'Millan, *ib.*), have been admitted, and the prosecutor is allowed to prove the whole particulars of the story, including such matters as whether she named any person as guilty of the crime.

In England proof on this latter point is excluded. Evidence may be taken as to whether the *fact* of a complaint was made by the party robbed or assaulted immediately after the occurrence, but the prosecutor is not permitted to enter into details of the statement. Evidence of the complaint is admissible, to show that at the time the person was a complaining party; and that fact, if proved, is a strong corroboration of her story. But when this is done, the whole purpose of the law is satisfied: all secondary evidence as to the

particulars of the statement are objectionable, on the ground of hearsay. This rule, which seems to have been a departure from the prior practice (Brazier's case, 1 East. P. C. 444), was so laid down by Rolfe, B., in *Reg. v. Megson*, 1840 (9 C. and P. 422). That was a case of rape. The woman, who died before the trial, came home evidently suffering from recent violence. It was proved that, on her return, she made a statement as to the injury she had received, and named the person who had committed it. Rolfe, B., rejected the particulars of the statement made by the deceased on her return. "In ordinary cases of rape," said he, "where a witness describes an outrage in the witness-box, evidence of her complaint soon after the occurrence of the outrage is properly admissible, to show her credit and the accuracy of her recollection. Here, however, the object is to give in evidence the particulars of the complaint, as independent evidence, with the view of showing who were persons who committed the offence. All that could be safely received, was her complaint that a dreadful outrage had been perpetrated upon her." Such evidence is received as confirmatory evidence only. Therefore the prosecutor must lay a foundation for it, by the production and examination of the principal witness. Thus, where the party injured was not present at the trial, evidence of complaints made by her was rejected altogether by Parke, B., who said it was no part of the *res gestæ*, but only confirmatory (*Reg. v. Guttridge*, 6 C. and P. 471). The rule was again repeated, in no less distinct terms, by an equally high authority—Sir C. Cresswell—in *Reg. v. Osborne*, 42 (Carr. and Marsh. 622). A witness was asked whether the prosecutrix, or woman assaulted, had made a complaint. The judge directed her to answer yes or no. The witness answered yes, and was then proposed to ask her whose name she mentioned. Cresswell, J.—"This statement of the prosecutrix does not form part of the *res gestæ*. If the prosecutrix had been under suffering, a surgeon might have examined her, and this state of her feelings might be evidence; but what she said about another person would stand on a very different ground. What the prosecutrix said at the time of committing the offence would be receivable in evidence, on the grounds that the prisoner was present, and the violence going on; but if the violence was over, and the prisoner had departed, and the prosecutrix had gone on running away, crying out the name of the person, it would not be evidence." So, in *Rex v. Wink*, 6 C. and P. 397, it was held by Patteson, J., that a person who had been robbed might be confirmed as to the fact of a complaint by the evidence of a constable to whom he made it, but that the constable could not be asked what the name of the person was whom the prisoner had mentioned.

These authorities seem to show that the existing Scotch practice on this point cannot be supported on any sound principle. It is quite erroneous to say that the statements of an injured party shortly

after the commission of the injury, form part of the *res gesta*. Evidence of the *fact* that such complaints were made, ought and is received in both countries, as the strongest confirmation of evidence on oath which can be given. But here the prosecutor should be stopped. All details, in strict principle, can only be received from the witnesses' own lips, under the sanction of an oath. The fact of the statements being recent, is no additional guarantee of their accuracy. A person, after being cruelly attacked, is not likely to be more accurate in his perception, or more truthful in his statements, from the confusion of mind which is the natural result of outrage.

THE NEW STATUTE LAW.

THE REGISTRATION OF LEASES ACT.

V. TRANSMISSION OF LEASE RIGHTS (*continued*).

II. TO HEIRS AND GENERAL DISPONEES.

AT common law, leases vest in the heir on the death of the ancestor, and without service. This statute has, however, introduced forms of procedure, by which an heir or general donee may make up titles to those leases and assignments in security which come under the Act.

I. *When the ancestor appears on the register as proprietor of the lease or assignment in security.*

In this case the heir has two modes open to him for completing his title:—

1. According to section 7, the heir of any person who died vested in right of a recorded lease, may make up his title to it by obtaining a writ of acknowledgment from the proprietor infest in the lands let. In the case of an heir succeeding to a recorded assignment in security, the writ of acknowledgment is to be obtained from the party appearing on the register as in absolute right of such lease, of, or over which such assignment in security has been granted. Schedule E of the Act contains forms for these writs. The registration of the writ of acknowledgment completes the heir's title, and it is declared "that no defect in the title of the proprietor, or party grantor of such writ, shall affect the right or title of such heir." It is to be observed, that this provision does not protect the heir's right or title against the consequence of defective *right* in the grantor of the writ of acknowledgment, but only against defects in his title.

2. The second mode of completing an heir's title to recorded leases and recorded assignments in security is described in sect. 8. It is as follows:—"It shall be competent to the heir who shall have been served by general or special service, or to the general donee

of any party who shall have died fully vested in right of any such lease or assignation in security recorded, as aforesaid, to expedite a notarial instrument in the form as nearly as may be of the schedule (F) to this Act annexed; and the recording of such instrument in the register in which such lease is recorded, shall complete the title of such heir or disponent to such lease or assignation in security."

Schedule F contains two forms. No. 1 refers to case of lease, No. 2 to case of assignation in security. In the first form, as applicable to an heir, the notary is required to narrate that the heir "has made up title by service as [specify relationship] and heir of the lessee [insert date of service], or as heir of L. M. in an assignation by the said lessee."

The difficulties which will arise in giving effect to these provisions are brought out in a note by the editor of the recent edition of "Bell's Commentaries" (Mr Shaw, the present Sheriff of Chancery):—"Hitherto it has been understood as settled law, that on the death of a party in right of a lease (of whatever duration it might be), the right of the defunct passed instantly on his death into the person of his heir; in other words, *mortuus sedit vivum*. The provision, therefore, in this statute, as to services in leases, is a novelty; and it is understood that it was introduced at one of the latest stages of its progress through Parliament, without being generally known. The office of a service is to take the *hereditas jacens* out of the party who has died vested in feudal subjects. But a lease is not a feudal subject; and as the heir is vested *ipso jure* on the death of the tenant, a service is plainly incompetent, because nothing remains in *hereditate jacenti* of the defunct to be taken up by a service. The schedule seems to contemplate a special service only, but this is impracticable, unless material changes be made on the form of that proceeding under the Service Act; and it bears also that the service shall be duly 'retoured to Chancery.' But by that Act retours are abolished."¹

It is probable that the framers of the Act, having given to recorded leases in some respects the qualities of real rights, intended that they should be handled by feudal solemnities, and with this view made service a mode of transmitting them. There will, however, be some difficulty in applying feudal principles to them.

It is difficult to say in what cases it was intended that general service should be used, and in what cases special, as the Act gives no explanation. Had the matter been left to a construction of the Act itself, without regard to the terms of the schedules, it might have been supposed that the object of the provision was merely to supply the notary with authentic evidence that the person claiming to be the heir really was so. For this purpose a general or special service would have been equally effectual. The schedules, however, contain this expression—"to which lease, E. F. has made

¹ Shaw's edition of Bell's Commentaries, ii. 902, Note L.

up title by service." This appears to be inconsistent with the notion that the service was merely required as a declarator. If the registration of a lease in the Register of Sasines is to be held as being equivalent to infeftment, a special service would seem to be appropriate; but if the registered lease is considered as a real right not requiring infeftment, a general service would be the proper one.

The Service of Heirs Act declares, that a special service shall include a general service as to the particular subject to which the special service applies; but its effect, to this extent even, seems to be limited, from the decision in the case of Lockhart and others, *Moreton's Trustees, v. Moreton*, 19th July 1854, 16 D, 1108, where it was held that, when no infeftment had followed upon a special service, it did not carry a personal right to the lands.

The notarial instruments must bear that the service has been duly retoured to Chancery. A legal equivalent for retours has been provided by sect. 13 of the Service of Heirs Act (10 and 11 Vict., cap. 47). It declares, "that the decree of service so recorded and extracted, shall have the full legal effect of a service duly retoured to Chancery, and shall be equivalent to the retour of a service under the Brieve of Inquest, according to the law and practice heretofore existing; and the extract of such decree, or any second or later extract thereof, under the hand of the proper officer entitled to make such extracts for the time, shall be equivalent to, and have the full legal effect of, the certified extract of the retour now in use according to the existing law and practice." The expression in the schedule of the statute could not be held to derogate from this, and a notary would have to give the same effect to the extract decree of service as he would have given to a certified extract of a retour to Chancery.

II. *When the ancestor does not appear on the Register as in right of the lease or assignation in security.*

Ancestors coming under this description may be in one of two positions,—either the lease or assignation may appear on the record as the right of another, or the lease or assignation may not have been recorded.

1. *When the lease or assignation in security stands on the Register in another name than the ancestor's.*

An ancestor's right would, in this case, probably rest upon an unrecorded assignation to a lease, or an unrecorded translation of an assignation in security. For such cases, sect. 9 provides that the heir shall obtain a notarial instrument, setting forth his right by service to the unrecorded deed, which instrument becomes a warrant for the keeper recording the deed in the ancestor's favour, and at the same time, on its being recorded as an instrument on the service, it completes the heir's title, and brings his name upon the register to the lease. The notarial instrument must bear that the heir has made up his title by service. A general service would seem to

be most in keeping with feudal usages in a case like this, where the ancestor's right is merely personal.

2. *When the lease or assignation in security is not recorded.*

In this case, from the right never having been recorded under this statute, a service seems unnecessary; yet sect. 5 requires the heir to obtain a notarial instrument, as an authority to the keeper to record the lease or assignation in security, and that instrument must narrate that the heir has made up his title to it by service. A general service would seem to be proper here. The registration of the notarial instrument, and the lease or assignation in security, completes the heir's title. The instrument in this case also serves two purposes. It is the warrant for recording, as showing the right to record, and it is an instrument upon the service, and so has feudal efficacy in completing the title.

It will be observed that the course of procedure is the same in cases where the ancestor's name does not appear on the register, whether the right is a recorded right or not, though the Act provides for them in different sections.

III. TO ADJUDGERS.

When an adjudication of any recorded lease or assignation in security has been obtained against the party vested in the right, or the heir of any such party, the recording of the abbreviate of adjudication in the register where the lease has been recorded completes the adjudger's right. (Sect. 10.)

IV. TO TRUSTEE ON SEQUESTERED ESTATE.

The trustee on the sequestered estate of any party, in right of a recorded lease or assignation in security, may complete his title by recording a notarial instrument, in the form prescribed by the Act, in the register in which the lease is recorded. (Sect. 11.)

VI. RENUNCIATION OF LEASES AND DISCHARGE OF ASSIGNATION IN SECURITY.

Provision is made in sect. 13 for the extinction of recorded rights. The keeper of the register is required to record the renunciation of a recorded lease, or the discharge of a recorded assignation in security, on its being presented by, or on behalf of, the party appearing on the register as having right to the same. In terms of this section, the "renunciation or discharge *may be* in the form of the schedules G and H, respectively, to this Act annexed, and *may be* endorsed on such lease or assignation in security." These words seem to make neither the use of the schedules nor the endorsement imperative. It would be advisable to adopt the suggestions of the statute, but the keeper of the register could hardly refuse to record

on the ground that they were not complied with. The schedules may be authoritative in this respect, that they show the intention of the statute that the renunciation or discharge be signed by the party *appearing on the register* as having the right. The section of the Act, apart from the schedule, does no more than require that the renunciation be presented by, or on behalf of, the party appearing on the register in right; and the words, "on behalf of," might be held to cover the case of an assignee, as having an implied mandate to dispose of the lease as he thinks fit. Indeed, if they could not be so construed, an unrecorded assignee could not record a valid renunciation signed by a cedent whose right is recorded. But the schedule, in being only applicable to the case of a grantor with a recorded right, is too much in keeping with the feudal spirit of the Act to be disregarded as an inapplicable form. It would therefore appear, that if a party having an unrecorded right cannot get a renunciation signed by the person appearing in the register, he must complete his own title before he can execute a valid renunciation.

VII. REDUCTIONS.

On the production of an extract decree of reduction of any recorded lease, assignation, assignation in security, translation, adjudication, instrument, discharge, or renunciation, to the keeper of the register, he is required to record the same forthwith. (Sect. 14.)

VIII. EXTRACTS OF LEASES.

When a registerable lease has been recorded in the Books of Council and Session, or in the books of any Sheriff or Burgh Court, *before the date of the Act*, an extract may be recorded, under the present Act, to the same effect as if the original lease had been recorded. (Sect. 19.)

An extract of a lease recorded in any of these Court Books, after date of the Act, would not be recordable; but a warrant might perhaps be obtained to borrow the principal lease for the purpose of recording it, though this Act makes no such provision.

IX. SCHEDULES.

The several clauses in the schedules appended to the Act are to be held "to import such and the like meaning, and to have such and the like effect, as is declared by the Act 10 and 11 Vict., cap. 50, sect. 2 and 3, to belong to the corresponding clauses in the schedule to the said recited Act annexed.

X. THE SHORT TITLE OF THE ACT.

This Act may be cited for all purposes as "The Registration of Leases (Scotland) Act, 1857."

THOUGHTS ON LAW REFORM.

LETTER SIXTH.

I ANTICIPATE that one of the guarantees alluded to at the close of my last communication would come into being as a natural outgrowth of the proposed change. If you carry the Outer House jurisdiction out of Edinburgh; if you localise it in the various Sheriff Courts throughout the country, together with its scale of fees for pleading; the large and influential bodies of local practitioners who surround these courts, in such places as Glasgow, Dundee, or Aberdeen, would readily supply men having a special vocation and aptitude for the business of a pleader; men who would, in that event, exclusively adopt as their own that branch of the legal profession.

Time was when the intellectual supremacy of Edinburgh in matters legal was so strongly felt and asserted, that the law administered by our provincial judges was, in its inferiority to that obtainable by suitors in the Supreme Court, likened to rough "rubble" masonwork, unfit to bear any comparison with polished ashlar. It was also common, in pleading an advocacy, to bewail the *inopia peritorum* which was supposed to darken the face of the land beyond the precincts of the capital. Even now, these strutting phrases have not disappeared from the Parliament House.

Conceding that there was no exaggeration implied in these claims of immeasurable superiority fifty years ago, and that the farther we travel backwards the more such views become the expression of an actual fact, I may venture to ask, whether no exaggeration be implied in their retention now? It is true now, as it was then, that Edinburgh is the seat of the Supreme Court, around which the most learned and able lawyers of the land will necessarily cluster; the men among whom the highest honours of the profession are distributed, and whose claim to them is most equitable and clear. I neither forget nor deplore this necessary supremacy of our legal capital; one principal aim of my proposals being to bring the whole inferior judicatories of the country more effectually under the salutary influence of metropolitan learning, by facilitating and simplifying our process of review. But neither let us forget the increase which has taken place in the population of the country, its advance in civilisation and the arts of peace, of which jurisprudence is assuredly one. The extent to which modern legislation has admitted the Sheriff Courts to participate in the primary jurisdiction of the Outer House, is a significant fact in connection with that progress. It shows that the civil affairs of the country have so increased in number, as to exceed, in the shape of legal business, what the Outer House could overtake. It is also an acknowledgment of the increased efficiency of our local tribunals. In the natural order of things, it became inevitable that, in a great and populous centre of

commercial activity and enterprise such as Glasgow, a race of able lawyers should spring up; and what is true of our commercial metropolis is proportionally true of the other large towns of Scotland. It is absolutely untrue of no place in the country where there is a Sheriff Court in full activity, and not kept up as a piece of empty form.

To the existing bodies of local practitioners I look for the supply of those pleaders whom the proposed change would call into existence. I do not imply a severance of their connection with the parent body; on the contrary, that tie would necessarily be maintained by their position as regular pleaders in the local court. But I do not see why the highest honours of the profession should not be open to their ambition. My proposal is, that they should receive a diploma from the Faculty of Advocates as their title to plead; so that, on their attainment of professional eminence, they might return to Edinburgh, and join the ranks of their brethren in the Parliament House, without any let or hindrance in the shape of a new entrance examination. And so the Scottish Bar would attain what I conceive to be, in our time, its true position; and instead of being limited to the pleaders before the Supreme Court, it would assume the proportions of a truly national body, having its stem in Edinburgh, and its branches in every important community, agricultural and mercantile, within Scotland.

Thus, with the transfer of the Outer House jurisdiction out of the Court of Session, I propose the extension of that higher branch of the legal profession, who are pre-eminently the tribunal of public opinion to whom the official conduct of our judges is amenable. I cannot resist the belief, that their influence in that capacity would be greatly strengthened by such an extension of their number, and such a distribution of their position throughout the country as I have indicated. I believe that such a connection and interdependence between the metropolitan Bar and their provincial brethren, would be a security to both against the narrowing tendencies of that local *esprit de corps* which in some measure is inevitable, and in due measure is not undesirable. I do not disguise my desire to see the legal profession attain a still higher, or perhaps I should say a more catholic, standing than that which at present belongs to it; but the increase of power and influence to which I point, is one which can only operate for the public good; it is an increase in the power and influence of the Bar, watching, as trustees for the public, the legislative changes introduced from time to time in our municipal jurisprudence, and controlling, by the weight and authority of their opinion, the administration of justice in all our tribunals.

Some obstacles to the practical realisation of these views could be obviated by carrying a little farther the principle of a recent statute; I mean the Sheriffs Amalgamation Act of 1853. In these days of rapid communication between one part of the country and another, there are some sheriff courts which might be dispensed with, and

converted into mere small-debt stations, with no disadvantage to suitors, and with some gain to the public revenue. In a word, the judicial establishment of the country, instead of being adapted to the artificial divisions of shires, should be distributed according to the actual requirements of the country, upon the basis of business and population.

These is another guarantee for sound decision as to which this is not the place to say much, but which, in any proposal for bettering our judicial institutions, cannot be overlooked: I mean legal education. Scotland has no more than six law chairs,—three in Edinburgh (a fourth being in abeyance), one in Glasgow, and two in Aberdeen. In England, due regard being had to its superior wealth and population, the provision made for this great public interest is still more wretchedly meagre. If on both sides of the Tweed we look not merely at the small number of the law chairs, but to the important branches of jurisprudence which are left altogether untaught, the deficiencies of our existing means of legal education become much more striking. Some foreign writers have noted our respect for law as a characteristic of the Anglo-Saxon race. No doubt it is so. We revere that which secures our individual rights, our personal independence, and freedom against the oppression of the powerful; our attachment to these blessings is deeply impressed on every part of our municipal system, and especially on our criminal jurisprudence. But assuredly, if in no country more than ours is law in honour as an institution, there are few countries in which it is less in honour as a science.

I do not mean to dwell upon this, for the University reformers are astir, and an increased provision for legal education occupies a conspicuous place in their programme. If I mention the matter at all, it is to remind my readers of the direct connection which exists between good law well administered on the one hand, and a good legal education on the other. So stated, the assertion sounds like a truism; yet is it a truth which is continually forgotten. We send our youth to the law classes rather as a matter of traditional routine, than from any well-defined belief that society will hereafter derive any tangible benefit from the learning they may acquire there. I make it a point in the Jurisprudence of Remedy, that the pleaders and judges to whom you—the general public—look for the vindication of your rights and the redress of your wrongs, ought to be accomplished and learned men. You do not require proof of this: it is a matter of obvious common sense, and, fortunately, to some extent it is matter of experience also; but you certainly do require to be reminded of it. To my brethren themselves, I would say, with all respect, that the higher their standard of learning, the more will their profession prove attractive to men of intellect, irrespective of its inherent allurements in the shape of money, place,

and power; the more it will maintain its real dignity as a profession, the higher it will rise above the level of a trade. All honour to the present Dean of Faculty for what he has done in the matter of examinations for admission into the learned body over which he presides. He has connected his name, already so distinguished, with an inestimable boon both to the public and to the legal profession. I propose to extend its benefits to all in Scotland who follow the calling of a pleader, and, through them, to all who have a matter to litigate in any of our courts of law.

Let me now, by way of summary and illustration, suppose two cases, as widely different as may be in the requirements they respectively make upon any judicial machinery which may be established for their solution:—

1. A thinks himself entitled to an estate, under the settlement of a party deceased. B, who is in possession, resists the claim. The parties are at one as to all the facts, but they differ irreconcilably as to the meaning of the will.

Let A, in conformity with my proposals, bring his action before the sheriff, asking decree in terms of certain conclusions in which his reading of the will is embodied and made operative in his favour. If there be a dilatory plea, it will be disposed of as it now is, at the first hearing of the cause. If not, the cause will proceed to the Debate Roll, to be heard on the following materials for judgment: the deed, the adjusted note of admissions, the conclusions of the summons. Judgment in the shape of articulate findings in law will be pronounced. The case will then go directly from the first judge to one of the Divisions of the Supreme Court, not by process of advocacy, but by simple enrolment.

I do not see why, in such a case, and in ordinary circumstances, the primary judgment may not be obtained within ten days of the first calling of the cause, and the judgment of review within a month afterwards. For, if judicial machinery adequate to the wants of the country be provided, such a thing as a long roll of causes ought to be unknown.

2. Take now a case of a very different sort. It is an action of damages. The pursuer asks for decree of damages in respect of certain injuries to his person or character. The species and extent of the injury, its time and place, are as shortly but as clearly defined in the conclusions of the summons, as in the minor of a well-drawn criminal indictment. The field of proof is thus clearly and unmis-takeably limited from the first.

After disposal of any dilatory plea, the first step will be proof, parties giving each other notice by intimating the names of witnesses, and lodging the documents on which they mean to rely. The result is a verdict by the judge, setting forth articulately the facts which are to be the basis of the ultimate decree. The verdict comes in place of the note of admissions in the previous case. After that

point, the procedure in both is the same—except this, that there may be a motion for a new trial, and that, in certain actions of damages, it might be expedient to give the Supreme Court power, upon the materials before them, and without a new trial, either to modify or increase the sum of damages found due by the primary judge.

In ordinary circumstances, I cannot believe that the time occupied by the latter case would be twice as much as that required by the former. How far we are from realising such short periods in our actual conduct of litigation, any practitioner can tell.

Time given to formalities, time given to anything else than the merits of the cause, is what I am anxious to save. To the litigant, such a saving is plainly a money saving also,—a saving of which the amount can scarcely be exaggerated. But I propose no reduction in the scale of lawyers' fees. It may be for consideration whether, as a further discouragement of unnecessary delays, the payment of solicitors should not exclusively consist of a per centage, under a certain maximum limitation, on the money recovered; or a lump sum, payable according to an adjusted scale, where the matter in issue, as in a question of status for instance, does not admit of a money valuation. Whatever its form, the remuneration must be liberal. It is a public interest that lawyers should be respectable. To be respectable, it is essential that they should be well paid.

I purposely abstain from saying more than a very few words on the appellate jurisdiction of the House of Lords. That is a matter which has recently been discussed, and will probably before long be matter of discussion again. I am one of those who hold that the improvements, if such they are, which our jurisprudence owes to the Woolfsack, ought to have proceeded from the Legislature. And I do not see why a unanimous judgment pronounced by a Division of the Supreme Court should not remain final, subject to this proviso, that the dissent of a single judge should send the cause to the whole Court.

I here close these papers, satisfied if, without having produced conviction, they have stirred the thoughts of any who take an interest in the subject. If it shall be thought that some of my proposals are startling and revolutionary, my answer is, that there is scarcely any one of them which may not appeal to some recent legislative change as an encouragement, as a step taken in the very same direction. I cannot believe that the efforts of our law reformers will stop at the point they have already reached. More will surely be done to bring our Jurisprudence of Remedy in harmony with the requirements and the enlightenment of modern civilisation. The age which has inaugurated free trade, which has laid its submarine electric cables, and launched its Leviathans, will scarcely accept it as a necessary law in the providential government of

human affairs, that less than two, or three, or four years, is too short a time to determine the question whether A cheated B in obtaining a lease, or whether C's reading be preferable to D's in the construction of a deed of entail.

ICTVS.

Review.

The Western Bank.—The downfall of the Western Bank, besides the destruction of confidence which it has caused in all our banking institutions, and the calamity and ruin which it has brought upon families, has excited considerable discussion in reference to the duties of the Lord Advocate. The authors of the evil were undoubtedly the directors of the bank, who failed to exercise that thorough control over a reckless manager, which, no doubt, each of them exercised in his own affairs over his own dependents. There are two questions which naturally and necessarily present themselves upon this state of the facts. *First*, Have the shareholders who have been ruined a *civil* remedy against the directors, to obtain compensation for their heavy loss? This is a question which must be left in the hands of the shareholders themselves, and which will be determined upon principles totally different from those upon which the other and more public and interesting question must turn. That *second* question is, whether the directors are open to a *criminal* prosecution? This is a matter in regard to which no one can offer an opinion, who has not had the advantage of knowing the exact measure of guilt of each director or set of directors. Very strong statements have been made upon the subject, both in Parliament and by the press; and if these statements be true, there cannot be a doubt that, according to the law of Scotland, these directors could be convicted of a serious crime. It has been said, that they declared a dividend of 9 per cent., after they were well aware of the utter bankruptcy of the concern, and that they held out assurances of its safety a few months before its doors were closed. Now, this was something more than what a merchant does who has sustained a heavy loss, when he, in the expectation of better times, still holds on, and does not at once call a meeting of his creditors. If, at the time when these statements were made (if they were made), and that dividend declared, the bank was in such a condition, that, according to no rational anticipation, could it be saved from its approaching doom, it would certainly be a very defective state of our criminal law if it could not reach such a case. If the matter consisted merely in the directors having *neglected* their duty, and allowed themselves to be the dupes of their manager, then it would be perhaps a very harsh proceeding to convict them criminally, although in such circumstances they might be civilly responsible in

action of damages. But this case goes beyond neglect; it is a positive action.

The question, however, at present is not the guilt or innocence of the directors, but merely, whether there shall be an *inquiry* into their conduct. It is not even the question, whether they shall be tried, but simply, whether a precognition shall be taken. Now, upon this matter the Lord Advocate is reported to have made statements as to his powers and duties, which, we venture to say, are new to the profession, and which he will, we think, on reconsideration, admit to be erroneous. He is reported to have said, that it is not his duty to put himself into activity in the prosecution of a crime like this, although the parties who have been wronged have themselves investigated the matter, and taken the precognitions which would enable him to lodge in his hands an information. Here, we submit, the Lord Advocate is elevating the exception into the rule. Is it not a notorious fact, that 90 per cent. of all the prosecutions in Scotland are raised and carried out without any information having been lodged? In the vast majority of crimes, no particular individual has such a special interest, as to induce him to incur the expense and undertake the responsibility of lodging an information; and criminal justice is set in motion on the call of public rumour.

It would certainly be a most grievous state of the law, if the injured widows and orphans, whose all has perished in the Western Bank, should, in order to bring the authors (supposing they are guilty) of their ruin to public justice, be obliged to incur the expense of those preliminary investigations which would be necessary before lodging their information. This, truly, would be heaping affliction on the afflicted. There is not the slightest ground for saying that this is a condition to any steps being taken in the way of prosecution by the Lord Advocate. It is true that, of recent years, Crown officers, in cases of fraudulent bankruptcy, have refused to prosecute, except on the condition that the defrauded creditors should bear the expense of the prosecution; and the result of this practice has been, that prosecutions for fraudulent bankruptcy are now matters of history. The great prevailing crime of the day, in consequence, escaped with entire impunity; and persons are thus tempted to their own and their neighbours' undoing. We are inclined to think that this practice must have been what was referred to by the Lord Advocate, and misapprehended by the reporters in the House of Commons. Holding the case of the Western Bank to be which would come under the category of conspiracy to defraud) to be in the same position as fraudulent bankruptcy, he has merely followed the practice of his more recent predecessors, in saying that the victims of the fraud must themselves bear all the expense and the burden of the preliminary investigations, and lay the materials before him ready for trial. If such was the statement made to the House of Commons, it was not the expression of an erroneous opinion, but the adherence to a bad practice, which ought at once

to be abandoned. We are not aware under what Lord Advocate this practice was inaugurated; but it is certainly one which has no warrant in ancient precedent, and has tended to foster a code of commercial morality the most discreditable that ever existed among a civilised people.

In the case of the Western Bank, there can be no doubt of the propriety of inquiry, were it for nothing else than to allay the public distrust. The directors are men in an influential position, publicly accused of a great crime; the matter is made notorious by the downfall of the bank; and special information is given to the public, in the examination of the Macdonalds and the Monteiths. In these circumstances, if there be no precognitions taken, the administration of the law might be justly charged with the reproach, that it has one mode of dealing with the rich, and another with the poor; and we venture to say, that there is not an argument that would be more telling with a jury, who may be trying a poor man for falsehood, fraud, and wilful imposition, than that, while he is tried for obtaining a cask of molasses or a box of soap upon false pretences, the conduct of the wealthy directors of the Western Bank was never inquired into at all, though millions of money disappeared under their management.

But let us not be mistaken as saying that these directors must be *tried*. All that we think any rational man is entitled to ask, is that the Lord Advocate should make inquiry. Let him take precognitions; let him investigate the books; let him give instructions to one of his deputed to procure the materials at the public expense; and then, having done all this, let him, upon the responsibility of his oath of office, pronounce his judgment. If he arrive at the conclusion that there are not such materials as would justify him in putting the directors on their trial, let him say so, and the public would be satisfied, and a stain would be taken from the character of these men, who, after all, might turn out to have been nothing more than over-credulous dupes. If the Lord Advocate, after such inquiry, were satisfied that there could be no conviction, most assuredly there ought to be no trial. Nay, even if he were satisfied that there might be a conviction, in consequence of the present excited state of the public mind, but that there *ought not* to be a conviction, then, too, there should be no trial.

The Lord Advocate is invested with a large discretion. He is not merely the public prosecutor; he exercises the functions of a judge. He has more than the powers of the grand jury in England, and he is in no way bound to place a man at the bar of the criminal court unless he is himself satisfied of his guilt; and the public would be satisfied, if, upon this question, the Lord Advocate had arrived at the conclusion, *after inquiry*, that it was inexpedient to put the directors to the torture and anxiety of a trial. More than this the public cannot justly demand; less than this they cannot with any propriety be refused.

Death of Lord Handyside.—The death of Lord Handyside has created a vacancy on the bench, and removed from among us an honest, conscientious, painstaking judge, at an age when he might have reasonably hoped for a more extended career. Of his professional qualifications this is not the time specially to treat; but this we will say, that although in some respects he was excelled by other judges, there were none who possessed in a higher degree the great faculty of independence of mind, and thorough determination to see nothing in a case but the merits. No man could have been so influenced by the circumstance that one of the parties or one of the agents might have been a friend, nor by any of the lower motives which often rise to the surface of our thoughts, and upon which all our philosophy floats away. He had a very extensive knowledge of the law; and his judgments bear witness to the fact, that his studies were not confined merely to the jurisprudence of Scotland. Whatever he wrote, too, he wrote clearly, and no one who had occasion to read his judgments required to do so a second time in order to ascertain the meaning. His long experience as an advocate-depute, as a sheriff, and as a justiciary judge, made him one of the best of our criminal lawyers; and in that province his services will be difficult to be supplied. It deserves to be kept in mind, that it was through his admirable management that the great prosecution of the Glasgow Cotton Spinners was matured and brought to a successful termination. The anxiety and labour which he thereon underwent, we have no doubt, gave the first shock to his constitution, and laid the seeds of that disease which has taken him from among us.

Of his successor we at present know nothing further than the current rumours, which point to Mr Penney. If this appointment is made, there cannot be a doubt that it would be acceptable to the profession, and only due to Mr Penney's position at the bar.

Public House Acts: Hill v. Dymock.—We note this case as a useful one for instruction and warning; useful also as illustrating a remarkable anomaly in our jurisprudence. The facts are briefly these:—

In July 1855, Hill was brought before one of the magistrates of Edinburgh, on a charge of contravening the Public House Acts. After hearing evidence on both sides, the magistrate convicted Hill, and sentenced him to pay a penalty of £5 and costs, with an alternative of imprisonment if payment were not made within fourteen days. Hill allowed the fourteen days to elapse, refused payment, and went to jail.

Immediately after his incarceration, he brought a process of suspension and liberation in the Court of Session. The conviction was quashed as informal. He then raised an action of damages against the Burgh Fiscal, the original complainer before the magistrate. In that action, the jury, on 1st ult., found for the pursuer;—damages,

L.145. No inquiry was allowed at the trial into the truth of the original complaint.

Rightly to appreciate this result, we must inquire into the nature and extent of the formal error by which it was brought about. What was the flaw in Hill's conviction which enabled him to turn the tables so victoriously on his prosecutor?

The statutes under which the conviction proceeded, provide that a record shall be preserved of the charge and judgment in a certain form, "or to such effect." The form in the schedule, so far as applicable to the present case, is as follows:—

"Compeared, C.D., and the complaint being read over to him, he denied the same; but it was proved against him by the oath of R. S., a credible witness; and therefore the bailie convicts the said C. D. of the offence charged against him, being a first offence, and finds him liable in the sum of," etc.

Here the record set forth Hill's compearance and denial of the charge, the examination of witnesses, and then proceeded as follows:—

"The bailie convicts the said Robert Hill of the offence charged against him, being a first offence, and finds him liable in the sum of L.5 and penalty," etc.

When statutes like these give a magistrate no discretion in framing a conviction, when they say that a particular form must be used and no other, the very letter of the Act must be complied with. No thing is in law more certain, nor in common sense more reasonable than this. No recourse must be had to equivalents. It will not be received as an apology for writing six, that the statute has required you to write half-a-dozen. Implicit and literal obedience is required for the simple reason, that if any deviation at all be allowed, endless discussions will arise as to the point where the deviation ceases to be right, and begins to be wrong.

Whether wisely or not we shall not say, the statutes in the present case did give the magistrate some latitude in framing his deliverance. Any conviction "to such effect" as the form in the schedule, was, *vi statuti*, equally valid.

In the inquiry whether the conviction under which Hill was incarcerated was to the same effect as that in the schedule, the Lord Ordinary (Neaves) held that it was not. He distinguished between a conviction following upon and embodying a statement that witnesses have been heard, and a conviction following upon and embodying a statement that the judge finds the matter proved by credible witnesses. The latter would have been right; the former was obviously wrong. Conviction in the mouth of a jury is a finding of guilty; not so in the mouth of a judge. Only the recollection that the First Division unanimously sanctioned these views, restrain us from characterising them as an elaborate argument to show that six is different from, and by no means to be confounded with, half-a-dozen.

At the worst, the deviation from correct procedure was small; and a verdict of L.145, with three or four times that sum in name of expenses, is surely a heavy penalty for such an error. No doubt the error, small as it is, might have been avoided; and certain unthinking persons will be apt to say that the Fiscal was rightly served; that such verdicts have a wholesome effect, etc., etc. To this and the like sapience we reply, that the good which the law must be presumed to have had in view might surely be obtained at a less cost. Hill's wrongs, if wrongs there were, have been avenged with unnecessary severity.

We read that King Cambyzes once punished a corrupt judge by flaying him alive, and nailing the skin of the victim to the judicial chair, in *terrorem* to his successors. Doubtless the monarch's flatterers told him that the judge was rightly served, and that the punishment would have a wholesome effect, etc., etc. Our verdict is a little "in Cambyzes' vein," but with a curious difference. Most properly, the excellent Burgh Fiscal, who was personally blameless in the matter, will not be made to pay the damages and costs out of his own pocket. But if it would be wrong—as it certainly would—to flay him, even in metaphor, for this venial sin of a subordinate, is it right to fleece, even infinitesimally, the rate-payers, whose personal concern with the blunder is absolutely naught?

And this leads us to consider, in the last place, the curious anomaly presented by this branch of our jurisprudence. The law, as it stands, or at least as it was administered in *Hill v. Dymock*, does not distinguish between an informal conviction and no conviction at all. However well founded in substance, if it be bad in form, the person convicted gets redress on exactly the same footing as if he were entirely guiltless. Of the facts actually adduced in evidence against Hill before the magistrate, we know nothing. If he was really guiltless of the charge, we do not in the least grudge him the measure of redress he has obtained. But if he was guilty, the result of those law proceedings has been a mockery of justice. Into the question of his guilt or innocence, the jury were not permitted to inquire. Neither shall we inquire into it; all we shall do in this purely legal criticism, is to assume the truth of the charge, as a court of law assumes the truth of the indictment in discussing its relevancy. On that assumption, Hill was entitled to be freed from an informal conviction and its consequences; but why should the law go farther, and convert a technical blunder into an occasion of profit from wrong-doing? The remedy is to allow the truth of the original complaint to be investigated at the trial; and to declare the original prosecutor entitled to a verdict, if he shall satisfy the jury that he acted not only without malice, but also with good probable cause.

Coming Measures.—The profession will be interested to learn, that the Lord Advocate is about to introduce certain measures, af-

fecting the law, of an importance worthy of his position among lawyers. Besides the Bill concerning the Universities, which has already been introduced in the House of Commons, he has under consideration certain amendments in the law of husband and wife. These, amongst other important reforms, are likely to afford greater protection to the wife and her property in cases of desertion. A Bill is also in draft regarding Registration, which will effect some useful changes respecting deeds registerable, and the mode of registering. But the most important of all the Scotch measures of the new Administration, will be a Bill for further simplifying conveyancing. The profession must be prepared to expect not only the abolition of the sasine, but other modifications of a most extensive character. What these are, it is at present premature to indicate; but we believe the public may rest satisfied that the cause of law reform was never in safer hands. A great lawyer is always the ablest law reformer; and at present the country is fortunate in having at the head of Scotch affairs a Lord Advocate with views as liberal as his professional reputation is distinguished. At the same time, we hope that, in any changes that may take place, the *interests of the profession will not be allowed to suffer*. It is vain to attempt any opposition to reforms—such as the removal of all mere matters of form—which commend themselves to the common sense of the country. But the principle has now been established by the Legislature, that compensation is as much due in respect of loss arising from an Act of Parliament, as from any other cause. This was the condition of the recent changes in the English Ecclesiastical Courts. The public Exchequer is pledged to make an ample return for any losses which the proctors have sustained; and already claims have been lodged, amounting it is said to a quarter of a million annually. In other words, the practitioners in Doctors Commons have been literally bought up at a frightful expense to the country—not, it is to be observed, in respect of any sacrifices which they have made—they are still at liberty to practise their profession—no department of it has been absorbed or abolished—their monopoly has been only broken up; and the loss of a monopoly does not necessarily mean the loss of business. This fortunate issue of the recent agitation is entirely due to themselves. They secured it by a firm, rational, and well organised representation of their interests. We hope the profession in Scotland, in the serious changes with which they are now threatened, will take care to follow their example. They have suffered sufficiently in times past. In 1838, on the passing of the statute of her present Majesty with respect to diligence, no less a sum than L.25,000 *a year* was lost to the profession in Edinburgh. For this they have never received one farthing of compensation. We are surely, therefore, entitled to expect, that if Parliament deems certain amendments necessary in the number and style of legal writs—involving large sacrifices to the members of a profession who have an expensive education to

undergo, and a difficult and delicate duty to discharge—compensation will be made in some form or other. At present, a law agent has a very great responsibility. He draws a deed for a mere brokerage fee. He repays himself by certain charges in respect of other steps in the transaction, which society has now discovered to be no longer necessary; and if these formalities are to be removed, no one will undertake the responsibility of conducting a transaction without some more adequate return than the present scale of fees does afford.

Police Courts—Stipendiary Magistrates.—Our readers will remember the case of *Gray v. M'Gill*, in which the High Court of Justiciary lately unanimously quashed a sentence of a Glasgow police magistrate, and the strong and indignant language in which Lords Ivory and Ardmillan condemned the conduct of the proceedings in the inferior court. The case is another added to the long list of examples which show that some reform in the administration of justice in our Police Courts is imperatively called for. As the circumstances must be fresh in the recollection of our readers, we need not detail them at any length. Suffice it to say, that a young boy, the son of respectable parents resident in Glasgow, whose own character was certified to be excellent by the teacher whose school he attended, was one morning dragged out of his bed by some police officers on a charge of theft; that the police officers, in doing so, acted without the warrant of a magistrate—a course of conduct quite unjustifiable, as the alleged theft had been committed two or three days before, during which time a warrant might have been easily obtained; that on the morning of his apprehension, and within two or three hours after it, he was placed at the bar of the Police Court and subjected to a mock trial, without being allowed the assistance of a law agent or the advice of his parents or guardians; that he was convicted of the charge made against him, "*partly on his own admissions, and partly on the evidence adduced*,"—a proceeding, the monstrous illegality of which requires no comment; that thereafter he was sent to prison, where it was discovered that the warrant for his transmission thither, in addition to its other irregularities, was not yet signed by the magistrate; and that, after the punishment was inflicted on the poor boy, it was discovered that the warrant had been made out in such a bungled manner, that the signature of the magistrate appeared on the face of it in two places where it had been deleted.

A good deal of the responsibility for these blunders certainly rests on the police officials, and they will no doubt be soon taught this in a very practical way;¹ but the purpose for which we now notice the case, is to call attention to that part of it which more

¹ Since this was written, we read in the newspapers that a considerable sum has been paid to the boy and his parents as a compromise of a threatened action of damages.

particularly affects the magistrate who presided on the trial, and the *legal* assessor who sat by his side. A sense of humanity might have induced the magistrate to pause before proceeding to try a boy of so tender years, standing for the first time at the bar of a Police Court, unaided and unprotected by relative or friend, and very likely totally ignorant of the serious nature of the charge brought against him; an ordinary knowledge of the practice of criminal law ought to have told the magistrate's assessor that in various previous cases the High Court had quashed convictions obtained against young boys in such circumstances; and a proper appreciation of its principles should have induced him to reject, as insufficient evidence to convict any person, testimony of itself inadequate for the purpose, but rendered so, as he thought, by what he calls the "admissions" of the boy. We do not forget, when we write thus, that, in our higher criminal courts, evidence of itself insufficient to convict is often completed by an admission in the declaration of the accused; but in such cases the admission is made after the accused has been informed that he may answer the questions put to him or not, as he pleases, and duly warned that what he does say will be taken down in writing, and may be used in evidence against him. The fairness and justice to the accused of the system even of judicial declarations, may, with much plausibility, be questioned; but it differs widely from the method pursued in this case, of obtaining an admission from the boy Gray, on being suddenly dragged to the bar of the Police Court in the extraordinary circumstances stated. The one mode is sanctioned by law, while the other is not; and the conduct of the assessor, in allowing such an admission to weigh in supplementing evidence, which we are entitled to assume was insufficient without it, was, to say the least of it, most reprehensible.

This case throws some light on the way justice is administered in the Glasgow Police Court. Nor will it do to say that this is an exceptional case. It is well known that, in the great majority of the cases brought before the Police Court, the persons accused are so poor that they cannot possibly obtain justice by appealing to a superior court; and the sentence of the police magistrate is, therefore, to them practically a final one. Nor is it likely that the irregularities which were proved to have been committed in Gray's case are confined to the Police Courts of Glasgow. On the contrary, we may reasonably suppose that, if in a large city such as Glasgow such blunders are committed, and legal assessors go so far wrong, no better state of matters exists in our more provincial towns.

Now, the remedy for all this is the adoption of the system of stipendiary magistrates. We might then have some guarantee, that those who are unfortunately brought before our Police Courts would receive that justice which every man, woman, and child is entitled to demand. At all events, the experiment should be tried in Glasgow, and perhaps also in some of our larger towns. The gentleman appointed to the office, devoting, as he would be required to do, his

ole time to the discharge of its duties, would soon be enabled to command a most extensive knowledge of practice in Police Court cases. If it was found that his time was not fully occupied, it might be thought advisable to relieve the sheriffs of taking the declarations of prisoners who are to be tried before higher courts, and of attending the investigations into all cases of sudden death, and imposing the duties on the new official. They would peculiarly harmonize with his other duties in the Police Court, and the sheriffs would be freed from the responsibility of duties which, as was shown in a previous number, they have not at present time to attend to, in consequence of the multiplicity of their other business.

Another advantage to Glasgow which would follow the appointment of a stipendiary magistrate, would be, that the magistrates of the city would have more time to devote to the other duties of their office; and these, it is well known, are, irrespective of the Police Court business, sufficiently numerous and onerous. Better men, too, could be induced to accept the office, whose sole reason for declining principal honours at present is the harassing and disagreeable nature of the Police Court work.

The system of stipendiary magistrates has been found to work well in various large towns in England, and we know of nothing in this country which would prevent its introduction here being attended with equally beneficial results. The present mode of dispensing justice, as it were at second hand, by means of an assessor, with the assistance of an automaton magistrate, who acts as his mouth-piece, is vicious in principle, and therefore necessarily dangerous in practice. And the baneful consequences with which we every day see it is attended, looking especially to the magnitude of the interests which are affected by them, afford surely a sufficient reason for abandoning an antiquated system which does not guarantee justice to the public, and substituting for the magistrate and assessor a stipendiary magistrate, who would be made responsible for the judgments which he pronounces.

Correspondence.

THE REGISTRATION OF LEASES ACT.

(To the Editor of the *Journal of Jurisprudence*.)

THE short digest of the Registration of Leases Act, in the last number of the *Journal of Jurisprudence*, appears to me to contain two errors on matters of considerable importance.

1. The first supposed error has reference to the "mode of registering."

The writer of the article in question seems to think (1) that section 15 of the Leases Act is very different in its terms and meaning from sections in other Acts requiring registration of writs in the Registers of Sasines; and (2) that the

date of presentation of writs, and the date of entry in the Minute Book, are distinct and different.

1. It may be stated that the section referred to of the Leases Act, was intentionally copied *verbatim* from sec. 5 of the Acts 8 and 9 Vict., c. 31, and 10 and 11 Vict., c. 50. So, on the authority of the said article, the only safe course recommended to be followed as to leases, applies equally to heritable securities. It does not seem to have occurred to the writer, that by Act 1693, c. 14, the presenters of *sasines*, etc., are required to sign the Minute Book *instantly at the ingiving of the sasine*. There can be no doubt, that all writs presented for registration in the Registers of Sasines, are, by statute, required to be forthwith or instantly at the ingiving, entered in the Minute Book, which must be then signed by the keeper and presenter. This statutory requirement is not complied with in practice. In the General Office it is found to be impossible to observe it. Suppose twenty or thirty writs presented in the course of an hour, a thing not of unfrequent occurrence, and fancy when the presenter of the last of these might be able to complete the statutory duty imposed on him of signing the minute. In the most favourable circumstances, he would require to wait for six or eight hours.

The minuting of writs is not so simple and easy an operation as some would seem to think. It implies the careful reading over of the deeds, many of them long and complex, understanding their purport, and expressing that purport briefly and *accurately*. Considering the importance of the minutes, and the heavy responsibility resting on the keepers for their entire accuracy, ample time must be allowed for their preparation; and to force their instant entry in the Minute Book would be alike injurious to the lieges and the keepers. It may be worth consideration whether a general declaratory Act should not be passed on this subject, so as to reconcile the letter of the law with the universal practice.

2. The writer would seem to have a notion, that the date of the actual copying of the minute into the Minute Book, or the actual date of signing it by the keeper, which may be weeks after its presentation, or the date of the presenter's signing the minute, which, if done at all, may be months after the date of presentation, is the date of entry in the Minute Book. It must be remembered, that by Act 1693, c. 14, the keepers are ordained to mention, *inter alia*, in the minute of each writ, the day and hour of presentation; and that the minutes have to be completed immediately on the ingiving. It is abundantly clear that the Act, as well as the recent Acts, contemplate the date of presentation and the date of entry in the Minute Book as the same. As has been said, it is utterly impossible to obey the Act, by minuting immediately on presentation,—as impossible as to obtemper another Act, which requires that the writs presented shall be recorded *ad longum*, and returned to the ingivers within forty-eight hours after presentation. Still, as may be seen from the Minute Books in the Register House, the minute bears only one date, and that is the date of presentation. It might have been better had the sections of the Acts referred to borne “the date of the entry,” rather than “the date of entry.” It therefore appears, with all deference, that the “safe course” recommended in the article is equally illegal, as it is impracticable.

Taking the remarks in the article in question, in connection with those at pp. 360 and 361 of the first volume, it is obvious that the nature and purpose of the Presentation Book in the General Office are not properly understood. At the present time, when attention is being directed to our system of registration, it were well that nothing tending to bewilder or mislead inquirers should be enunciated by a journal of so great authority as the *Journal of Jurisprudence*.

The Presentation Book is not a statutory book, nor a part of a statutory book. In a question between the lieges, it is of no importance whatever. Suppose two bonds entered in the Presentation Book in a certain order, but entered in the reverse order in the Minute Book, can any reasonable doubt be entertained that the one first entered in the Minute Book would be preferable? The purpose of the Presentation Book is to afford assistance to the keepers in

taining the dates and hours of presentment, the names of the presenters, the order of presentation. In a question between the keepers and the presenters, it affords proof of the order of presentation; and might, therefore, in certain circumstances, be useful, in case of a writ being alleged to have been issued out of its order, as showing the fact.

The next supposed error refers to the construction of sec. 12 of the Leases

This section bears an intentional resemblance to sec. 6 of the Heritable Securities Acts before quoted. It seems, the article says, to apply only to *recordable* leases, executed after the passing of the Act. Reading the section by itself, apart from the context, it certainly means what it was intended to mean, viz., that *recordable* leases executed after the date of the Act shall be preferable, according to the priority of registration. It is said, that the fact that dates of recording are to regulate the preference, necessarily implies that competing leases have dates of recording. The same reasoning, if sound, would apply to heritable securities. The section implies, that to compete for a lease, the lease must be recorded. The article goes on thus: "The fact, that a registerable lease unrecorded must be held to be recorded of a subsequent date to one already on the register, is not conclusive, *because there is no necessity for its being recorded at all.*" But this is a plain begging of the question. It is quite true that sec. 2 provides, that *except for the purposes of the Act* it shall not be necessary to register. But one of the purposes of the Act contained in the section now under consideration, viz., "that all such leases, shall, in competition, be preferable according to the dates of recording." is also true, that the same section (2) provides that leases which would have been valid against singular successors by the law prior to the Act, "shall, though not recorded, be valid and effectual against such singular successors, as well as against the granters of the said leases." This clause undoubtedly applies to leases, whether executed before or after the passing of the Act, but only as in competition with *singular successors* and *granters*. The article itself says, "that the privilege which this clause confers, is validity against *singular successors* and *granters* only." It has no reference to a competition between *lessees*. On the other hand, section 12 applies, not to *singular successors* or *granters*, but to *lessees*. There is, therefore, in my humble opinion, nothing in the preceding which is inconsistent with sec. 12, supposing it to apply to all *recordable* leases executed after date of Act; which I believe it does. If, however, section 12 is not to apply to all *recordable* leases executed as aforesaid, but only to leases executed after date of Act, it is obvious that very anomalous results might be the consequence. For example, A and B receive each a registerable lease, executed after date of Act, of the same subjects; A enters into actual possession of the subjects, but does not record his lease (for some time at least); B records his lease, but takes no actual possession of the subjects. A, so long as he does not record his lease, is preferable to B. A, however, after enjoying a preference for some years, at length records his lease, and by doing so, his preference vanishes. In such a case, if leases being now recorded, the first recorded is preferable; B's lease is the preferable one.

Clearly, this cannot be the meaning of the section. With all submission, section 12 undoubtedly applies to all *recordable* leases executed after the passing of the Act.

Feb. 22, 1858.

E.

We have to thank our correspondent for calling our attention to the two mistakes he notices, though we adhere to our original opinion on both of them.

As regards section 15, on the "mode of registering," we hold,

That the date of registration is fixed by the actual date at which the entry is made in the Minute Book, and not by the date which the entry bears. It may have been the date of presentation; and that, in this respect, the present Act differs from both the Infestment Act and the Burgage Tenure Act.

2. That, as a necessary result of this, a lease entered in the Minute Book of a local Register to-day, is preferable to a lease not entered in the Minute Book of the General Register till to-morrow, though the latter may have been presented a week before the former.

3. As a practical inference, that a presenter should insist on getting his lease entered in the Minute Book forthwith, and that a keeper would then be responsible for any avoidable delay.

As regards the first of these propositions, the words of the Act appear to be free from ambiguity. Section 15, which directs that writs duly presented shall be entered in the Minute Book forthwith, declares that "the date of entry in the Minute Book shall be the date of registration." If the presentation and entry are simultaneous, as the Act evidently intended them to be, the date of entry will be the date of presentation; but if the two are separated, the date of entry must be looked to. It seems impossible to hold, that by date of entry the Act meant the date of presentation mentioned in the entry, if it supposed presentation and entry to be simultaneous. The date of registration of sasines is not fixed in the same way. The Infestment Act (8 and 9 Vict., c. 35, sec. 3) provides that the date of presentment and entry *set forth* on any such instrument by the keeper of the record, shall be taken to be the date of the instrument of sasine and infestment, and the Burgage Tenure Act (10 and 11 Vict., c. 49, sec. 7) has a similar provision. If, therefore, the date of presentment is *set forth* in the keeper's certificate as the date of presentment and entry, a preference will be secured as from the date of presentment.

Heritable securities, as our correspondent shows, are in the same position as leases, and, of course, our remarks apply equally to them.

Our second proposition rests upon the first. If the opposite doctrine, that the date of entry is the date of presentment mentioned in the entry, is correct, the actual date of entering in the Minute Book would be immaterial, and so would the position of the entry in the Minute Book. Our correspondent is therefore, inconsistent in holding, as he does, that, if two deeds are entered in the Minute Book in the reverse order of presentation, that the one first entered would be preferable.

If propositions 1 and 2 are correct, the importance of 3 is obvious. Nothing could show it better than the statement in the letter, that the entry in the Minute Book may not be completed for weeks after presentation. We are told, however, that it is equally impracticable and illegal to comply with the obvious intentions of the statute, by entering at once in the Minute Book; and we are charged with ignorance of the prescriptive right to disregard Acts of Parliament possessed by keepers of registers. We must still, however, take leave to doubt the power of any anterior custom or practice to over-ride the plain meaning of a new Act of Parliament. If recent statutes are to be treated as the old ones have been, we may at once give up the argument. But is the course pointed out by the present Act, as well as by the former statutes, impracticable? With great deference to the routine of the Sasine Office, we think it is not. There is no necessity for the full and elaborate minute being at once written out on presentation. The statute 1672, c. 16, requires only "the names and designations of the parties, and the common designation of the lordship

baronry, or tenendry, of the several lands mentioned in the writs ;" while the statute 1693, c. 14, requires the minute to express " the day and hour when, and the names and designations of the parties by whom, the said writs shall be presented." A short minute might be made containing these particulars in little more time than is required to make the entry in the Presentation Book, and a blank might be left for the full minute being copied in at leisure. Any danger that might possibly arise from blanks being left in the Minute Book, would be prevented by attaching consecutive numbers to the entries as they are made. As the full minutes are not required by statute, but for use, there seems to be no reason why they should not be entered in a separate book of reference, if more convenient.

II. As to the necessity of recording all recordable leases.

The whole question turns upon the first words in section 12, "all such leases." We understood them to apply to recorded leases only, while our correspondent maintains that they apply to all recordable leases. How is the meaning of the word "such" to be ascertained? One would suppose by reading the preceding context. If we do so, we find that the preceding section refers to recorded leases exclusively, and that the words, "such lease," are used in that sense throughout the clause. Our correspondent wisely avoids this common-place mode of solving the difficulty. He commences his argument thus: "Reading the section by itself, *apart from the context*, it certainly means what it was intended to mean, namely," etc. Meeting him upon his own ground, we still think our former argument a sound one. It is to be observed that this section, *in express terms*, merely regulates the preference of competing leases, though it may, as our correspondent says, imply "that to compete successfully, the lease must be recorded." But if it implies this, does it not imply that the competing leases, whose preference it is intended to regulate, have that character or capacity which is the condition precedent to successful competition? and if so, do not the *express terms* of the clause apply to recorded leases only? But if the *express terms* of the clause apply only to the competition of recorded leases, what more is implied as to unrecorded leases, than that they do not come under it?

The reason why an heritable security unrecorded cannot compete with one recorded is, that until it is recorded it has no validity as a real right. It is otherwise with a lease, which may be valid as a real right without recording. It was on this ground, and on the faith of the saving clause in section 2, "provided always, that except for the purposes of this Act, it shall not be necessary to record any such lease," that we made the statement, that there was no necessity for a lease being recorded; but we are now informed that one of the purposes of the Act is to enable leases to get out of the way of the Act! How much quiet humour must have been intended to lie in that "provided always," if it was really meant to say, "you need not record your lease; but if you don't, every recorded lease will be preferred to you." It is admitted, however, that an unrecorded lease, valid as a real right, will continue to be so, both against the grantor and against a singular successor, though not against a recorded lessee. But a recorded lease must either be regarded as a personal right or a real right,

in a question with another lease. If it is to be considered as a personal right, the recorded lessee can be in no better position than the grantor, whose right he holds; and, if it is to be considered as a real right, he is a singular successor; so that in either view a lease protected by the Act 1449 would, even on the strictest interpretation of section 2, be valid against him.

The case put by our correspondent is not so anomalous as it appears to be at first sight. A lessee, in recording his lease, voluntarily changes the nature of his right, and subjects it to new rules of preference. At all events, greater anomalies would follow if our correspondent's views were correct. For example, an improbable lease would then be more valuable than a probative lease unrecorded. But we place no reliance on this mode of argument. If any man is afraid of anomalies, let him not study Acts of Parliament.

We have thought it right to answer this letter fully, that our readers may have the whole case before them, and may be able to judge for themselves.—
ED. J. J.]

“THE STAMP LAWS.”

“DO LATTER WILLS AND TESTAMENTS REQUIRE TO BE STAMPED?”

I BEG to be allowed, through your columns, to enter a protest against the article on this subject in your last number; and I shall shortly state and explain my reasons of dissent.

It is an acknowledged general rule, in the construction of the Stamp Acts, as stated by Professor Menzies in his Lectures on Conveyancing, p. 88, “that the cases in which duty is to attach must be fairly and explicitly marked out by the terms of the statutes, and that a liberal construction is to be given to words of exemption.”

It is, further, the recognised policy of the law, the propriety of which I have never before known to be doubted, to show favour to wills, and encourage the making of them as a duty; and, apparently for this reason, the Stamp Acts themselves impose much heavier probate or inventory duty upon intestate than upon testate succession. The very circumstance, also, of these and other heavy duties being imposed by the Stamp Acts upon the succession to a deceased party, seems, of itself, a strong reason for not likewise imposing a separate stamp duty upon wills. Indeed, the legacy duty is just, in effect, an *ad valorem* stamp duty upon wills, payable, according to the policy of the law, by the legatee instead of the testator; and it is contrary to the principle of the Stamp Acts to impose duties for the same thing, under two or more separate heads.

As to authorities in favour of the exemption of wills from a specific stamp duty (for which you say there are none), I beg to make the following references:—Bell's Law Dictionary, *voce* “Wills,” p. 1046, says, “A will by which moveable property only is to be disposed of, and which contains no registration clause, may be written on unstamped paper; but where heritage is to be destined, it is necessary, according to the practice in Scotland, to use what are commonly called deed stamps.” Again, taking a still wider view, Professor Menzies, in his recently published Lectures on Conveyancing, p. 87, enumerates amongst a list of deeds exempted from stamp duty, “wills, testamentary instruments, and dispositions *mortis causa* of every description.” Likewise, the Law Chronicle, published at Dundee, vol. ii., p. 131, contains a report, dated 8th February 1858, under the signature of the party who had transacted the matter, setting forth that, in consequence of a recent previously reported judgment of the Commissary Court at Perth (Wilson v. Wilson, 4th March 1856, vol. i., p. 105), finding that a will containing a clause of registration “is

a deed under the Stamp Act, and therefore requires to be duly stamped before it can be pled in process." The Society of Writers in Dundee, through the reporter, "presented to the Commissioners of Stamps a last will and testament, with a clause of registration, and in terms of the 13th section of the statute, 16 and 17 Vict., c. 59, required their opinion as to whether the writ was or was not chargeable with stamp duty." The result was stated to be, that the writ had been returned "impressed with a stamp, to the effect that it is 'adjudged not chargeable with any stamp duty.'" You seem to treat the judgment of the Commissioners in such cases as entitled to little weight, and represent that their power in such matters was conferred by "the Act 17 and 18 Vict., c. 83, sect. 17, on the express reason, 'to prevent fraud and evasion of stamp duty.'" This, however, I submit to be an error. The Act which conferred these powers was not the Act referred to (which by the section cited only authorised them to require proof of the facts), but 13 and 14 Vict., c. 97, sect. 14 and 16, and 17 Vict., c. 59, sect. 13; the first of which proceeded on the preamble: "Whereas doubts frequently arise as to the stamp duties with which some deeds or instruments are chargeable, and it is expedient that provision should be made whereby such doubts may be removed." Power is given to the party who presents the deed, if dissatisfied, and a stamp has been imposed, to appeal to the Court of Exchequer at Westminster;—but, subject only to that appeal at the instance of *that* party, the judgment is final, and must be given effect to in all courts of law or equity, whatever might have otherwise been the opinions of these courts on the subject; and, in the present instance, the judgment of the Commissioners is also entitled to the more weight, as a precedent, that it is in favour of exemption, on which side they are not likely to err. The case you refer to, as having occurred in a Sheriff Court, when a lease was three consecutive times successively objected to as inadequately stamped, could not have been a judgment of the Commissioners, but, if really blundered, must have been the blunder of the agent, or of one of the Stamp Office subordinates. *Lastly*, it is the settled rule in England, under the same clauses of the Stamp Acts, that wills and testamentary writings, of whatever form, and whether embracing real or personal property, or both, are not, as such, subject to any stamp duty whatever, either as deeds or otherwise.

You say, however, that while you admit it to be "a very generally received opinion among all grades of the profession," that latter wills and testaments are exempt from stamp duty, "the practice must be one of some doubt, when the fact is known, that, in some counties, whenever the objection has been taken to this class of deeds as unstamped, it has been sustained by different sheriffs, including, we believe, such high authorities as Sheriffs M'Neill, Whigham, Anderson, Crawford, and Mure." All these sheriffs named were sheriffs of Perthshire; and the writer of the passage quoted may perhaps have had peculiar means of knowing the practice of the Sheriff and Commissary Court of Perth. But in the case of *Wilson v. Wilson*, above noticed as recently decided in the Commissary Court of Perth, and reported in the *Law Chronicle*, vol. i., p. 106, there is, after a search made, only *one* precedent referred to,—namely, a judgment of Sheriff Whigham; and it is remarkable, that not only Sheriff Mure,—who, after much previous doubt, gave the judgment in that case of *Wilson* finding a stamp necessary,—but also Sheriff Whigham, expressly founded their judgment upon the circumstance, that the will there objected to contained a clause of registration, and that they had ascertained from the Stamp Office officials in Edinburgh, that, when containing such a clause, but only then, it was their practice to hold a deed stamp necessary. These two authorities at least, therefore, are authorities *against*, and not in favour of, your doctrine, that every form of latter will and testament, although confined to moveables, is liable to be stamped as a deed, quite *independent* of whether it contains a clause of registration or not: for you maintain, and I think maintain rightly, that the clause of registration is no part of the *essentials* of a deed, and really does not affect the question. The only case in which the Stamp

Acts themselves recognise the clause of registration as making any difference whatever, is the single case of agreements, which, by a recent Act, have the benefit of a reduced stamp when not containing a clause of registration. But this is a matter of special legislation, applicable to agreements alone; and the inference rather is, that in no other case is it intended, or can it be pleaded, that the clause of registration shall affect the question of stamp at all.

To come, however, to the Stamp Acts themselves, as to which I admit that the schedule annexed to the Act 55 Geo. III., c. 184, still gives the general rule, you say that the schedule enumerates, as subject to an uniform stamp duty of L. 1, 15s., known as the common deed stamp duty, assignation, conveyance, disposition, and deed of any kind whatever, not otherwise charged, nor expressly exempted. Such comprehensive words, you maintain, clearly embrace a last will and testament of moveables; and you add, "If it be not one or other of these kinds, it will indeed be a problem to designate it under any other known name of legal writs." Now, I do most decidedly maintain that these said comprehensive words do *not* embrace a last will and testament of moveables. The whole writs enumerated, and intended by the Act to be designated, are instruments executed *inter vivos*, and requiring *delivery* as an essential, neither of which descriptions apply to wills. You yourself quote a passage from Tilsey, that "delivery is of course *essential* to constitute a deed;" and you also observe, that "there exists no analogy between *mortis causa* deeds and agreements *inter vivos*." Moreover, a will confined to moveables does not require to contain any words of assignment, or conveyance, or disposition, or obligation. A mere nomination of an executor, with a direction to pay the legacies stated, is, both in England and Scotland, a complete form of will, confined to moveables. But, further, I think your alternative problem is very easily solved. "Wills, testaments, testamentary instruments, and dispositions *mortis causa*," are themselves "known names of legal writs;" and these names occur in the Stamp Act as exemptions from the *ad valorem* stamp duty imposed under the general head, "Settlement," which is likewise a known name of legal writ, comprehending wills and other testamentary writings. Has a man left a "settlement?"—meaning a will or other testamentary writing,—are words of common use; and the Stamp Act itself, by putting the exemption under that head, without reference to any other head, shows that "settlement" was the only head of the schedule under which wills and testamentary writings were understood to fall. In searching over the schedule, I can find no other. It seems to me that these are the views which have led to the settled rule on the subject in England, and they seem equally applicable to Scotland.

It may be said, however, that, if these views are well founded, the exemption would also apply to *mortis causa* settlements of heritage, which you think no one would venture to maintain. Now there is, in Scotland, a peculiarity in regard to a *mortis causa* settlement of heritage, which does not apply to an English one. The peculiarities of the feudal tenure, even for a *mortis causa* disposition of heritage, require the word "*dispone*" to be made use of in the form of a *de presenti* conveyance, for which there is no equivalent in England; and "disposition" in Scotland, not otherwise charged, is specially subjected to the deed duty. But if it were not for the difficulty of the established practice in Scotland, and Scotch precedents to the contrary, I do think that there are good grounds for maintaining that "dispositions *mortis causa* of any kind," which are coupled in the same exemption with "wills, testaments, and testamentary writings," were intended by the Act to be equally exempted from all stamp duty. I think the separate head, "disposition," on which the deed stamp duty was imposed, was, like the other deeds enumerated, a deed, not merely *in form*, but *in substance*, *inter vivos*, and requiring *delivery* like the others,—that it was, in fact, just the Scotch law term for "conveyance" in England, and meant to go no further. It has been seen, also, that Professor Menzies specifies, without qualification, "disposition *mortis causa* of every description," as coming within the general exemption, along with wills and

stamentary writings; and I have been told, though not on certain authority, that, at a year or two ago, an Edinburgh law agent sent up to the Stamp Office in London a general *mortis causa* disposition of heritage and moveables in favour of a client, to get it stamped without a penalty, as having been executed within the time allowed for that purpose, and that it was returned as not requiring a stamp. I think it would be well worthy of a trial, therefore, for the party to try the same experiment, in regard to a *mortis causa* disposition of heritage, which has already been successfully tried in regard to a will with registration clause, by sending it to the Commissioners of Inland Revenue for their judgment, under sect. 13 of 16 and 17 Vict., c. 59; and if it should be determined by them, that a *mortis causa* settlement of heritage in Scotland is liable to a deed stamp, while it is exempted in England, I submit, notwithstanding your professed and peculiar admiration for stamps on wills, you would be advantageously, and certainly more popularly, use your influence to get notice to Scotland, by the same exemption being expressly declared by statute to extend also to Scotland.—I am, etc.,

G. N.

The practical importance of this question, which you have discussed in your last number, induces me to offer a suggestion for its solution.

The Stamp Act is applicable alike to England and to Scotland, and I think the point must have been authoritatively determined in the former country. It is very well there must be judicially *proved* before the executor can enter on the duties of his office, and is thus directly brought under the notice of the Judges of the Court of Probate. The number of litigations regarding the validity of wills in England is also very great. Are, or are not, unstamped wills admitted to proof in England? Does the judge of the Probate Court look at them? It occurs to me, that an affirmative or negative answer to these questions would settle the point in practice.

I think the English practice the more important in this question, because the Stamp Act seems to have been formed, as regards its phraseology, chiefly with reference to the law of that country; and the sense in which the Act employs the words "assignation," "conveyance," "disposition," and "deed," can only be gathered from their use by English lawyers,—e.g.: If Mr Tilley is right in stating, in the passage you quote from him, that *delivery* is essential to the constitution of a "deed," this would seem to show that a will is not in England considered a deed, because a will does not require delivery.

Allow me also to remark, that the practice of writing wills on unstamped paper seems to have received something like the sanction of the Supreme Court in Scotland. In the case of *Macmillan v. Macmillan*, 28th Nov. 1850, which related to a writing on the fly-leaf of a Bible, founded on as a holograph will, the party pleading its validity was successful. The decision did not turn on the question of stamp or no stamp; but, in the note issued by the Lord Ordinary (Robertson), his Lordship expressly stated, "It does not require a stamp, as the subjects left will pay inventory duty." No contrary opinion was expressed in the Inner House; and it seems a fair inference, that, as the fact of the want of a stamp was thus directly brought under the notice of the Court, and as, notwithstanding, not only did the judges not refuse to look at the writing, but adjudicated on it, and sustained it as valid, they were satisfied that a stamp was not necessary.

A READER.

Your last number must have frightened a good many legal practitioners out of their propriety. The reasoning by which the conclusion is come to, that testaments do require a stamp, is apparently logical; and the consequences, if that doctrine be sound, might in many cases be troublesome. But can it be,

that the almost universal practice of the profession, both in England and Scotland, and the sanction given to that practice by the Commissioners of Inland Revenue themselves, in holding a testament of moveables to be free from stamp duty, have nothing but the frail foundation of a *communis error* to stand upon! Let us see.

In the first place, it is to be observed, that the Stamp Acts are not framed upon the principle of subjecting to payment of duty *every writing* which a man or woman may have occasion to sign in the course of his or her lifetime. On the contrary, the Acts granting the stamp duties declare, that they shall be levied "for and in respect of the several instruments, matters, and things mentioned and described in the schedules thereunto annexed." The Acts proceed on the plan or principle of enumerating or specifying the various kinds of writings to which the duties are to attach; and confessedly, in order to substantiate an objection to any particular writing as unstamped, it must be shown to be clearly one of those mentioned and described in the Acts or relative schedules. Now, a will or testament is certainly not *named* in any of the Acts as an instrument, matter, or thing liable to stamp duty; and as certainly, *some* of the instruments under which the writer in the Journal attempts to bring them,—e.g., assignment or assignment, conveyance, and disposition,—do not, in their ordinary meaning, comprehend a latter will or testament. These are all instruments having for their object the transfer of property, or of some right or interest in property *inter vivos*, whatever different forms of expression they may use for the accomplishment of that purpose. A testament, on the other hand, as defined by Mr Erskine (iii., 9, 5), is "a declaration of what a person wills to be done with his estate after his death," including properly the nomination of executors for carrying out that will. The common acceptance of the word "settlement," or even the definition of it given in the Stamp Act of 1815, might, without any violence of construction, be in many cases, though not in all, applied to a will or testament; but then all testamentary writings, and dispositions *mortis causa*, are expressly exempted from the *ad valorem* duties thereby imposed upon settlements. The most general of these terms, CONVEYANCE, though it may be, and sometimes is, stretched so as to include devises of real or personal estate, is in its usual meaning limited to written instruments intended to carry over property from one person, the grantor, to another party, the grantee, both of them parties to the deed. *Prima facie*, a will or testament is neither an assignment, a disposition, nor a conveyance. But then, the schedule has a term more comprehensive still: "DEED of any kind whatever, *not otherwise charged in this schedule, nor expressly exempted from all stamp duty*, L.1. 15s." This is really the pinching expression, and the embarrassment arising from it is by no means lessened by the difficulty of finding anywhere a precise definition of the meaning of the word "deed," under all its aspects. The idea, that a written instrument, which would otherwise be a *deed*, ceases to be such when the clause of registration has been omitted, is indefensible; although "agreements" which have been treated in that way, may have the benefit of a lower rate than the general deed duty of 35s. It is a mistake, however, to suppose that "all agreements, of whatever value, are now required to be put on half-crown stamps." The Acts reducing the duty on agreements without any clause of registration from 20s. to 2s. 6d., retain the words, "where the matter thereof shall be of the value of L.20 or upwards." There is not, so far as I have noticed, any express exemption from all stamp duty of agreements where the subject-matter is under that value. Yet, if the word "deed" is to be held as descriptive of any legal instrument whereby a right is conferred or obligation imposed, then, upon a rigid construction of the Stamp Acts, agreements of the lower value, whether with or without a clause of registration, would be subject to the higher rate of duty, while the more important agreements, without such a clause, would not pay a tithe of it. The suggestion, that a written instrument is a deed, or not a deed, according as it has or has not a testing clause, is equally unsatisfactory: for, in that view, an instrument written by another person

in the granter, and therefore invalid unless clenched with a testing clause, would require a stamp; while the same instrument, holograph of the granter, is therefore valid without a testing clause, would not require a stamp. Then, again, as to the matter of deeds, it has been repeatedly decided that a writing which imports a mere acknowledgment of debt, but which does not, like a note or bill, express the obligation incumbent upon the granter, in either case, pay the debt, requires no stamp, and consequently is not a deed in the sense of the Stamp Acts. To bring a writing within the scope of these Acts as a deed, therefore, something more seems requisite than that it should be executed in such a way, and expressed in such terms, as to be productive merely of legal rights or obligations; though it is this circumstance which always, I doubt not, is the occasion of the question being raised, whether such or such an instrument does or does not need to be stamped. What may be the true differential quality of a deed, I shall not pretend to determine. One feature, however, cannot be passed over, and I adopt it from the article in your Journal, relating which lays claim to this character, should be one denoting a completed act on the part of the maker. A latter will or testament does not satisfy this condition. It is ambulatory during the granter's life, and does not take effect until confirmed by his dying without having revoked it. It is thus different in its nature from those writings which are meant to operate so soon as executed and delivered, and is, in fact, rather an expression of intention of a finished act. Though signed, sealed, and delivered, it may be retracted, revised, remodelled, or altogether extinguished by the granter, while it may, indeed, become efficacious by his death; but the statutes impose stamp duty upon that act. On this plea, then, latter wills and testaments may be permitted to ride off "free from stamp duty." Dispositions of moveables *mortis causa*, with power of revocation expressed or implied, may perhaps have a right to follow in their train. Dispositions of heritage, even when made *mortis causa*, must be in form alienations *de presenti*; and therefore in Scotland, written upon stamped paper. The ambulatory character of wills affords at least a strong reason why they should be free of stamp duty. It is of importance that a man should have the opportunity of reconsidering from time to time any settlement of his worldly affairs which he may have made, and to tax him on every such occasion would be oppressive.—I am, etc.,

S. D.

A writer of the very ingenious article bearing this title, in your Journal of a month, considers that the exemption of latter wills and testaments from stamp duty is a privilege not conferred on them by statute, but has arisen solely from the course of professional practice, without any good assignable reason. Moreover, he complains that while, on the one hand, moveable property, no matter how great its amount, can be conveyed *mortis causa* free from duty, and, on the other hand, heritable property, no matter how trifling its value, cannot be so transferred without being subjected to a tax.

In arriving at this conclusion, it strikes me that the writer has directed his attention exclusively to the first head of the schedule appended to the Act 55 Geo. III., c. 184; otherwise, not only would he have discovered that Government exacted a duty in respect of the matter affected by these deeds, which is all value for the so-called privilege of exemption, but, as regards the duty upon the transference of property *mortis causa*, so far from liberality being shown to moveables, the immunity from duty is all in favour of heritage.

Looking at the schedule of duties to which the Stamp Act refers, it will be observed as divided into three heads, viz.:—1st, Duties on deeds in general, 'and on other instruments, matters and things not falling under either of the following heads'; 2d, Duties on law proceedings; and 3d, Duties on probates of wills, confirmations of testaments, inventories to be exhibited in commissary

courts, etc. Under the first head, we do not find wills or testaments entered in the table in their alphabetical order, and when mention is made of them, it is only as exemptions under other deeds, to which they might be presumed to belong,—in short, they are not specifically stated to be subject to duty. Now, as wills and testaments were deeds of every-day occurrence, and of the highest importance, the question naturally arises, Why are they not entered in this head, as subject to duty? Do they form any of the matters or things falling under the other heads of the schedule? for, if so, the reason of exemption is expressed and obvious. On considering head third, I think it will at once be allowed that wills and testaments are virtually subjected to duty under it. They may not nominally be so, but the "matters and things" which they settle, convey, or dispose of, most undeniably are, so soon as the deeds are put in operation.

It will be observed, that the method employed in imposing duties on dispositions, conveyances, or settlements *inter vivos*, is by a certain *ad valorem* rate, fixed according to the expressed value or amount of the property thereby conveyed or settled. This method is quite practicable where the value or amount is expressed, or can be otherwise ascertained; but in the case of wills and testaments, which are not to take effect until the death of the grantor, the difficulty or impossibility, not to say anything of the inexpediency, of attempting to fix the value of the property conveyed or settled at the time of the execution of the deeds, naturally necessitated some other means of imposing a duty upon them. This was effected by causing the executors to give up, upon oath, an inventory of the grantor's estate, as relative to the will or testament conveying it, upon which inventory a specific *ad valorem* duty is payable, in respect of the property so conveyed or settled. The will or testament is thus virtually taxed whenever it comes into operation; and to impose any duty while the grantor is in life, would be subjecting the deed to a double duty.

With regard to dispositions of heritage *mortis causa*, I hold that they can only be subjected to the simple 3s. deed stamp, because they do not fall under either the second or third heads of the schedule, and, by the first, they are specially exempted from *ad valorem* duties. For what reason heritage was allowed to escape so freely, is indeed a matter for speculation: perhaps it was in consideration of the difficulties attached to its transmission *inter vivos*. However, be the reason as it may, heritage has always been a favoured right, as is sufficiently evinced by the statute itself, which exempts it, unless when directed to be sold, from legacy tax!

In conclusion, I heartily concur with the writer, when he says, "It is unfair to place the burden on any class of deeds and persons;" and I ask him (assuming his simile of the millionaire) how lies the burden under the statute, when the proprietor of land to the value of a million pounds may transfer that land to his heir, after his own death, upon payment to Government of a duty of 3s., while he who holds the like value of moveable property, and transfers it to his executors, must pay through them a duty of L.15,000!

G. S.

THE TORBANEHILL CASE.

In the number of the *Journal* for November 1857, in the article on the Law of Fraud on Contracts, after urging that there is no duty of disclosure incumbent on a seller or a landlord in relation to a contract where the means of knowledge are equally open to both parties, and *a fortiori* where the party in ignorance has better means of information, the writer of the article proceeds to observe (p. 521), that in the cases of *Gillespie v. Russel and Son*, "the tenants under a mineral lease found among the minerals a coal, or other mineral closely resembling coal, of very great value; and it was alleged by the landlord, that previous to entering on the lease, they knew or had good reason to believe that that

mineral was in the lands, and it was pleaded that they were bound in law to communicate that knowledge to the landlord. The judgments in the case appear to go the length, at least, of holding that the tenants were under no such duty of disclosure."

This, however, was not the argument maintained by the proprietors, who have nowhere, and at no time, maintained that there was any duty of disclosure incumbent on the intending tenants. On the contrary, the proprietors have, throughout the whole discussions, fairly acknowledged that the opposite contracting parties were under no obligation to instruct them. What they have always maintained is, that the intending tenants were not entitled to deceive or entrap the proprietors by false and fraudulent representations; and that it because the tenants were under no obligation of disclosure, they were all the more bound not to deceive or mislead the proprietors, by direct representations made on direct or deliberate falsehood.

More particularly, the proprietors averred these three things:—1. That they were deceived by the tenants' representations; 2. That these representations were false, and were known to be false, by the tenants when they made them; and 3. That they were made fraudulently, and of set purpose to deceive, and to induce the proprietors to accept of a fixed and totally inadequate rent and lordship, in place of a fair share of the produce of the minerals.

It will thus be seen how entirely different the pleadings in the case of Gillespie Russel and Son are from what is assumed in the article in question.

THE PERSUEN'S AGENT.

English Cases.

BILL OF EXCHANGE.—*Married Woman—Separate Estate.*—A bill of exchange was drawn in favour of a married woman by the trustee under her marriage settlement (then in Australia), and intercepted by her husband, who adhibited his name to it, added his own, and offered it to defendant Prince to discount. Prince took it to the bankers, got it discounted, and paid over the money to the husband, who then absconded. On discovery of the fraud, the bankers recovered the amount from Prince, who in turn raised an action against the acceptors. The lady then filed a bill for an injunction against the action, and for an order against the acceptors, directing them to pay the amount on her separate receipt. The Court of Appeal, reversing the decision of the M. R., held that B, being a purchaser for valuable consideration, and a *bond fide* holder, as the person legally entitled, and that a court of equity would not interfere to defeat that title where there was no notice of the equities affecting the instrument. Whether or not the fact of a bill being drawn in favour of a married woman was in itself notice, was immaterial; because the defendant Prince, in answer to his inquiries, had been told by the husband that the lady's signature was her genuine handwriting.—(*Dawson v. Prince*, 30 L. T. Rep. 237.)

RATING.—*Sea-shore.*—The appellant, who was owner and lessee of the tolls for a pier at Great Yarmouth, was rated for the pier in respect thereof. The question was, what portion of the pier could be said to be in the parish. Lord Campbell, C. J.—"I am of opinion that the part of the pier above high-water mark is clearly within the parish, and that in respect of that the appellant is rateable. Indeed, that is admitted; but there are two other parts of the pier in dispute, the part between high and low-water mark, and the part below low-water mark. The part below low-water mark is now abandoned by the re-

spondents; and it is quite clear that it cannot be considered as within the parish, any more than it could if it had been seven miles out at sea. As to the part between high and low-water mark, it is quite clear that the soil between high and low-water mark is in the Crown, and *prima facie* extraparochial. If so, the onus lies on the parish, of showing that it is within the limits of the parish, which has not been done."—(Reg. v. Musson, 30 L. T. Rep. 272.)

JURISDICTION.—*Alien—High Seas—Murder.*—In Reg. v. Lopez, 30 L. T. Rep. 277, Lopez, a foreigner, was one of the crew of a British ship, and maliciously wounded another foreigner on board, on the high seas. He was tried at the Exeter assizes; and on a case reserved for the C. C. R., the Court sustained the jurisdiction. In Reg. v. Sattler, *Id.*, the prisoner, a foreigner, was arrested at Hamburg by a London detective, and taken on board an English steamer. The officer had no warrant. Prisoner shot him while the vessel was still in the Elbe, sixty miles from the sea; in such circumstances, that if it had been by an Englishman in an English county, it would have been murder. The officer died afterwards, and the prisoner was tried and convicted at the Central Criminal Court. The C. C. R. held that the prisoner was rightly convicted of murder. Lord Campbell, C. J., said,—“With respect to Reg. v. Lopez, we have no doubt that the offence which he committed was an offence against the law of England. He was on board an English ship, and under the protection of English law at the time, and therefore owed obedience to English law. The offence, therefore, which he committed was against the law. It is unnecessary to enter upon a discussion of the authorities cited, to prove that proposition; they are overwhelming. But it is satisfactory to know that the laws of America and of France in this respect are the same as our own.” With regard to the other case, Reg. v. Sattler, his lordship said, “I think that it is equally clear that although the prisoner was a foreigner, he committed an offence against the law of England. The case states, that ‘If the killing had been by an Englishman in an English county, it would have been murder. The deceased had no warrant.’ Here then is a crime committed on board an English ship, which would have been murder if the killing had been by an Englishman in an English county. Under these circumstances, we think that whether the detention of the prisoner was lawful or unlawful, he was guilty of murder, and of an offence against the law of England; for he was on board an English ship, which is considered to be a part of England, and was subject to the law of England; he was seized by an officer, who was an English subject, and he shot that officer, not for the purpose of making his escape, but out of revenge and malice. Therefore the Central Criminal Court had jurisdiction.”

COPYRIGHT.—*Agreement between Author and Publisher.*—Mr Charles Reade the author, agreed with Mr Bentley the publisher, as follows:—“It is agreed that the said R. Bentley shall publish, at his own expense and risk, a work at present entitled *Peg Woffington*; and after deducting from the produce of the sale thereof, the charges for printing, paper, advertisements, embellishments, if any, and other incidental expenses, including the allowance of 10 per cent. on the gross amount of the sale for commission and risk of bad debts, the profits remaining of every edition, that shall be printed of the work, are to be divided into two equal parts, one moiety to be paid to the said Charles Reade, and the other moiety to belong to the said Richard Bentley. The books sold to be accounted for at the trade sale price, reckoning 25 copies at 24, unless it be thought advisable to dispose of any copies, or of the remainder, at a lower price, which is left to the judgment and discretion of the said Richard Bentley.” A precisely similar agreement was made with respect to *Christie Johnstone*. Two editions of these works were issued; and Mr Bentley proposed issuing a third at 2s. Mr Reade objected, and filed a bill, praying that the joint adventure or partnership, should be declared at an end. Mr Bentley contended that he had been granted an irrevocable licence to print and publish. Wood, V. C. held—“That Mr Reade had not so parted with his interest in his books to preclude him from determining the arrangement. In the present case, he said, the

agreement was simply that the publisher would publish the work at his own expense and risk ; and then, after deducting all expenses which were specifically referred to, the profits remaining of every edition that should be printed were to be divided into equal parts. There were several ways in which the contract between author and publisher had been viewed in this and in other cases. It had been contended by Mr Reade, that this was a case of simple agency. But a simple agency it could not be—at least, not a mere agency—but it was a share in a risk, although the whole risk of bringing out the work, of advertising and printing, and so forth, was taken by the publisher. An agent might be paid out of profits, but an agent never embarked in the risk of the undertaking. Then it was said that it had been viewed at times, or might be—after disposing of the argument that was attempted as to its being an assignment of the copyright, which it was now clearly decided it could not be—it had been viewed partly as a joint adventure and partly as a licence to publish, which Mr Bentley contended was, from the nature of the case, and from the terms of the agreement, irrevocable. Well, what would be the course if the publisher thought that no other edition was called for ? The publisher might say he did not give up his right of sending out to the world at any future period a new edition. If he said decidedly that he would not publish at all, there would be less difficulty, and the contract would be at an end. If he were undecided, the matter might be in a state of suspense for months or years. This was not a situation in which one of the contracting parties ought to be put. Consequently, the period of the issue of a new edition was that at which the author was entitled to an account, and to determine the arrangement.”—(Reade v. Bentley, 30 L. T. Rep. 269.)

RAILWAY.—Undue Preference.—The Cockermonth and Workington Railway Company agreed to convey the coals from the pits of Lord Lonsdale's tenants at a less rate than the rates charged other coal proprietors from the same station, in consideration of his not making a line for his own use. *Held* to be an undue preference. Cockburn, C.-I.—“ I quite agree that this Court has intimated, if not absolutely decided, that a company is entitled to take into consideration any circumstances, either of a general or of a local and peculiar character, in considering the rate of charge which they will impose upon any particular traffic; as, for instance, if a company were to lay down a rule that if a certain quantity of goods were brought to be conveyed, they would charge less upon that certain quantity than they would upon a less quantity, regard being had to the cost of working the particular line. That would be a very fair ground upon which a company might justify the making a distinction between the two cases of one man sending a ton of goods at a time, and the other who sent one cwt. or less. So, also, if the company make a distinction between terminal traffic and intermediate traffic, where there may be very fair and sufficient reasons, as, for instance, in respect of terminal traffic, where there may be competition with another railway; and with reference to terminal traffic, as distinguished from intermediate traffic, it may be that there being so much more, they can afford to carry the goods over the whole line cheaper, or proportionably so, than they can over an intermediate part of the line. But those are all cases in which the general public is treated with perfect equality; although, where individual members of the public happen to be travelling between one place and another, there may be something in the reasons to which I have referred that would import what would be an apparent, but which, in point of fact, is not a real, injustice. But that is a very different thing from the present case. Here, these are collieries situate in the same locality, and a distinction is made between them upon these grounds, that Lord Lonsdale or his tenants would otherwise send their coals by some other conveyance, either by the ordinary mode, or by some railway which Lord Lonsdale would be induced to construct, if the company would not give him this advantage over others who are competing with him in the sale of coals. In my opinion, that is not a sufficient ground. Whatever rule the company lay down, it ought to

be a rule applicable to all persons similarly circumstanced.”—(*Harris v. the Cockermouth Railway Company*, 30 L. T. Rep. 273.)

—A railway company charged a larger sum for small parcels directed to different individuals, than when they were directed, whether loose or packed together, to one person. *Pickford and Co.*, the carriers, who collect parcels from different persons and forward them to their destination by railway, required the company to carry them, though directed to different persons, at the same rate as if they were packed in one parcel or directed to the same person. The Court of Ex. gave judgment for the railway, inasmuch as there was nothing on the parcels to show that they were for the same consignee. (*Baxendale v. East. Co. Railway*, 30 L. T. Rep. 320.)

Pilot.—Refusal to Deliver up Licence.—In the case of *Reg. v. Henry* (30 L. T. Rep. 256), it was decided that, under sect. 352 of the 17 & 18 Vict., c. 104 (The Merchant Shipping Act 1854), the pilotage authority by whom a pilot is appointed has an absolute power, without assigning any cause, to require him to deliver up his licence, and that a refusal to comply renders him liable to a penalty not exceeding L.10.

PARTNERSHIP.—Debtor and Creditor—Deed of Arrangement.—This was an action on two bills of exchange drawn upon the Stanton Iron Company, and “accepted for the Stanton Iron Company, James Haywood.” In the year 1848 two gentlemen, named Smith, who were partners as iron merchants at the Stanton Ironworks, in Derbyshire, became insolvent; a deed of composition was executed between them and their creditors; by this deed they conveyed to five trustees all their property, upon trust as to the joint estate, to possess themselves of it; and upon further trusts, that they, the said trustees or trustees, and their or his assigns, did and should “continue and carry on, under the name and style of the Stanton Iron Company, the business heretofore carried on by Messrs Smith, in copartnership as aforesaid.” The deed then conferred upon the trustees the most extensive powers, and provided that out of the gross income of the business, the creditors should be rateably paid, and that upon the debts being all paid the residue should belong to the Messrs Smith. The business was carried on by the acting trustees down to the year 1855 under the name of the Stanton Iron Company; towards the end of that year the plaintiff supplied the company with iron to the extent of L.1400 and upwards, for which he drew three bills addressed to the Stanton Iron Company, which were accepted by one of the trustees, thus: “Per procuration, the Stanton Iron Company, James Haywood.” The Court of C. B. held that the creditors were liable on the bills at the suit of the drawer. The Court of Ex. C. affirmed the decision (diss. *Martin Bramwell and Watson, B. B.*) The grounds of judgment were thus stated by Crompton, J.:—“This being the nature of the deed, it seems to me perfectly clear that the trustees, if they stood alone, would form a trading partnership; and as they do not stand alone, but are representatives and agents of the creditors generally, and as these last are intended to share in the net profits of the concern up to the extent of their several claims on the Messrs Smith, it is equally clear, and stands on the most undoubted law, as it seems to me, that these last are partners as against third persons, and liable as such to those who supply the money or goods by means of which the trade is carried on and the profits earned. This familiar principle of law was applied by the Court of Q. B., in *Owen v. Body*, 5 Ad. & Ell. 28, to a deed not so strong as the present, and recognised by the Court of C. P. in *Janes v. Whitbread*, 11 C. B. 408, nor was the principle itself disputed in the argument before us. But it was said not to be applicable to a case where the net income was shared only for the purpose of liquidating old debts. This seems to me, as regards third parties, an immaterial distinction. If creditors take into their own hands the concern of their debtors and carry it on with a view to profits, they are as much receiving the profits of that concern when they apply them to the paying off their outstanding claims as if, no such existing, they had purchased the trade of the insolvent trader—and they ought to be equally respon-

ble to the parties from whom they procure goods, or whom they employ for a purpose of making those profits. Nor can it be said that the trustees in this case are the trustees of the Smiths only, that they carry on the business for them only, and that the creditors are in the light only of persons who are advancing money to the concern for the purpose of carrying it on, and who are to be repaid from the concern, but have no interest in the rising or falling of the shares. This was the view taken of this deed certainly by the M. R. in *Re the Stanton Iron Company*, 25 L. J. 42; but, with all the respect which I entertain for that learned Judge, I am unable to agree with it. The trustees seem to be manifestly the representatives of the creditors; they act for them and under their control, and the trust for the Messrs Smith is not concurrent with overriding that for the creditors, but arising only when the trusts for the creditors are entirely satisfied, at which time the control also of the creditors ceases, and a new state of things begins."—(*Hickman v. Cox*, 30 L. T. p. 279.)

LAWN.—Freight—Bill of Lading.—Appeal from a judgment of the Supreme Court of New South Wales, on a special case, to the Privy Council. The question was brought by the consignees of certain large shipments of goods, that the owners of the ship "Alan Ker," trading lately between Glasgow and the port of Sydney, New South Wales, for the non-delivery of those goods. The defendants admitted the receipt of the goods in Glasgow, and their conveyance hence to Sydney by the "Alan Ker," under the bills of lading after mentioned; but they claimed a right to detain the goods for the freight, which was admitted by the plaintiffs had in fact not been paid. The question whether that right existed, under the circumstances, was submitted for the opinion of the Court by a special case stated for that purpose. In each of the bills of lading (there being four sets for separate parcels of goods respectively), shipment was stated to be by "Dickson and Company." The goods were to be deliverable in three instances to "Messrs Kirchner and Company" (the plaintiffs), or their assigns. In the fourth the goods were deliverable to "order," assigns, and indorsed to the plaintiffs. In each case the freight is made payable as follows:—"Freight for the said goods to be paid by the shippers," at certain rates specified; and in the margin of each bill were the following words: "Freight payable one month after sailing, ship lost or not lost." It was contended that there was no contract for freight, but a payment in lieu of freight, to be paid absolutely a month after sailing, whether freight was earned or not; that the contract was made by the shipper; and that, therefore, neither goods nor consignee were liable in the payment. The Court of New South Wales held that there was no lien on the goods, and that the plaintiffs were entitled to recover them. The Judicial Committee of the Privy Council affirmed the decision. "There is no doubt," said Lord Wensleydale, "about the law is upon the subject, that for freight properly so called—that is, for the carriage, conveyance, and delivery of goods—the shipowner is entitled to a lien upon the cargo, unless he has entered into a contract which is at variance with that lien, as, for instance, in cases that have been cited where the contract is to pay after the delivery of the cargo, not upon delivery of the cargo. The question in this case resolves itself simply into the construction of the written document which governs the conditions for the freight, and we are to decide that simply by reference to the instrument itself, without having in this case any evidence of the usage of the trade at Glasgow, from which port the goods were shipped, with respect to which, whether the evidence was admissible or not, is a matter, upon which their Lordships are not called upon to give any opinion. Our duty is a very simple one—to look at the different provisions of this bill of lading, and ascertain whether in that instrument the parties have stipulated for such a freight, that it would give them a lien upon the goods. If they had expressly stated, notwithstanding the apparently contradictory terms of this instrument, that freight was nevertheless to be paid, and that the shipowner

should have a lien upon the cargo; however difficult it might be to reconcile that with some of the provisions, that express stipulation would probably prevail, notwithstanding the great inconvenience which has been pointed out in the argument as to such a lien existing, where freight was to be payable under a contract of an anterior date. We are now to say whether, looking at all these instruments together, there is any contract between the parties, that they should be paid freight in that sense that it became a lien. Looking at the whole instrument together—that the freight is to be paid one month after sailing, totally irrespective of the safe delivery of the goods, and to be paid also by the shipper, instead of by the assignee—their Lordships are perfectly satisfied that in this instrument the word freight is not used in that sense; therefore, that there is no lien in this case upon the cargo, and the judgment of the Court below must be affirmed with costs.—(*How v. Kirchner*, 30 L. T. Rep. 296.)

THEFT.—Bank Agent—Proof of Taking.—Prisoner was a bank agent, and paid a salary, for which he was bound to provide a place for carrying on the business, and the office was attached to his own house. The office was filled up by the bank, and contained a safe with duplicate keys—one whereof was kept by the manager of the bank at the head office. It was the duty of the prisoner, when money was paid in by customers, to deposit in the safe, to remain till again taken out for the purposes of the bank. He furnished weekly accounts, which were audited occasionally. On one of these occasions there was a deficiency discovered of L.2000. At the previous audit two years ago, his accounts were correct. It was contended for the prisoner that he was not a clerk or servant; that there was, under the circumstances, no such possession by the prisoner, as could be treated as possession by the bank. The Judge directed the jury to find the prisoner guilty of larceny, if they were satisfied on the whole of the facts that any part of the sum admitted to have been misappropriated had at any time during the two years been taken from the money which, having been received from customers, had before such taking been placed in the safe and included in the weekly accounts furnished by the prisoner. He was found guilty. The C. C. R. held the conviction to be right; the safe in the case, it was remarked, very much resembled the till of a shop, to which the shopman had access for lawful purposes; but if he took anything, *animus furandi* he was a thief.—(*Reg. v. Wright*, 30 L. T. Rep. 292.)

—**Property.**—Indictment charged the prisoner, whilst servant to A, with having stolen certain monies of A. It was proved that he was servant to B, and the money stolen was only in the possession of A, as agent of B. Conviction affirmed. The allegation that he was servant to A was unnecessary, and though the absolute property was in one, other than A, his possession was a special property, sufficient to sustain the indictment.—(*Reg. v. Jennings*, 30 L. T. Rep. 292.)

FALSE PRETENCES.—Misrepresentation, coupled with a promise.—Prisoner borrowed 10s. of a woman, on the allegation that he kept a shop at a particular place, and that she might go home with him until she got a situation. It was untrue that he kept a shop, and when he got the money he disappeared. The woman swore that she gave the money on the face of the misrepresentation. The C. C. R. held it was a sufficient false pretence.—(*Reg. v. Tory*, 30 L. T. Rep. 292.)

—A person who offers a L.1 note as a L.5 note, and gets it changed as the fraudulent misrepresentation, is properly convicted of false pretences.—(*Reg. v. Jessop*, 30 L. T. Rep. 293.)

REPARATION.—Master and Servant.—Two railway companies used in common one railway entrance and two sidings east and west of the main line. A person in the employ of the one company, while mending some waggons on the west siding, was run into and killed by a train belonging to the other company (the defendants) and driven by their servants. Both companies issued separately the same rules to be observed by their servants, as to passing trains, etc. In an action, under Lord Campbell's Act for Compensation, by the representatives of

deceased, the jury found that neither the engine-driver, the man at the controls, nor the deceased, were to blame; but that the rules were insufficient, the defendants guilty of negligence. A rule nisi having been obtained to set aside the verdict, it was contended for the defendants that deceased was himself to blame in not keeping a look out. Rule discharged. Pollok, C. B. "I think it being found by the jury as a fact there was negligence in the defendants, and no negligence in any other person whatever, we must give some effect to that finding, by upholding the verdict or grant a new trial, and the alternative is not before us; but the question with which we are dealing is, whether we shall enter the verdict for the defendants? I own I, for one, upon this narrow ground, and some of my brothers, I believe, upon larger grounds, are agreed the rule must be discharged, and the verdict should stand. I must now (I am speaking merely my own personal private opinion), I think we ought to be extremely cautious how we relax the rule that was laid down in the Court originally, but which now is undoubtedly the law of the land, with respect to servants in a common employ suffering by the negligence of each other. I believe there was never a more useful decision, or one of greater ethical and social importance in the whole history of the law. I believe it is the law—I thoroughly understood it to be so before attention was called to it; for if it had not been so, we could hardly have lived into the present century without having actions brought over and over again. No such action would have been brought before the time when it was proposed to make a master liable in respect of one servant for the negligence of another. I think we ought to be exceedingly cautious how we allow what I must say I consider to be the important benefits of that decision, to be frittered away by nice distinctions, or to be broken in upon by the ingenuity of advocates, or by the verdicts of juries. But, in the present case, I am by no means prepared to say I would have concurred in any disturbance of the verdict as it stands; but there is the verdict of the jury, upon which, I think, we must act."—(*Vose v. Lancashire and Yorkshire Railway Company*, 30 L. T. Rep. 289.)

BANK CHEQUE.—Due Presentation.—Action on a cheque. Plea—that it was presented in a reasonable time. The cheque was dated 30th May 1856, and was presented 30th March 1857—the partnership of the drawers having been dissolved in the interval (30th Jan. 1857), and their account closed with the bank. The Court of C. B. affirmed the rule of the Court of Q. B. in *Binson v. Hauksford*, 9 Q. B. 52, where Pattison J. said, "No time less than years would be unreasonable, unless some loss were occasioned by the delay."—(*Laws v. Rand*, 30 L. T. Rep. 286.)

COUNSEL, AGENT, AND CLIENT.—Compromise.—Two actions were brought against defendant—one by Miss Brooks for breach of promise of marriage—another by her father for the seduction of his daughter. Miss Brooks had consulted a counsel in the county, who wrote the defendant on the subject; but as they could not be agreed on, he recommended her to an attorney. This person she never saw, but the proceedings connected with the action were prepared in his office. At the assizes, when the causes were ready for trial, she and her father told the managing-clerk to settle on the best terms he could; and terms were adjusted in Court, in presence of the counsel she had first consulted, who was her junior. She afterwards refused to be bound thereby, and repudiated the agreement. The Court ordered a new trial. Pollok, C. B.—"A verdict obtained under an arrangement and a promise to do some matter, cannot stand, unless the condition be substantially performed. The verdict, therefore, must be set aside, and we think that it ought to be with costs, to be paid by the plaintiff's attorney, who will settle with his client how far he had authority to do what he did. If he had authority, she will pay; but if he had not, it is very proper that the costs should be paid by him. The rule, therefore, will be absolute for a new trial, with an order that the costs of the trial and of this action be paid by the plaintiff's attorney."—(*Brooks v. Cox*, 30 L. T. Rep. 288.)

INSURANCE.—Unadjusted Losses—Broker—Set-off.—The executors of a de-

ceased underwriter sued brokers acting on a *del credere* commission for the balance of premiums which had become due during the lifetime of the deceased. Defendants claimed to deduct the loss on a policy which had not been adjusted till after the party's death. The Court of Q. B. held that, irrespective of an express agreement or established custom, a loss upon a policy unadjusted at the death of the underwriter was no defence to an action by his executors for premiums due to him in his lifetime. Lord Campbell, C. J.—“At the time of the death or bankruptcy of the underwriters there may be risks on policies underwritten, which, it may be, would not run off for two or three years; and it would be strange if the personal representatives of the assignees could not recover the sum due to them for the premiums till upon a final settlement of all dealings to which they were parties, and the exact amount of the sum to be recovered could be ascertained.”—(*Beckwith v. Bullen*, 30 L. T. Rep. 284.)

SUCCESSION DUTIES ACT.—The second section of the 16 and 17 Vict., c. 51, imposes the duty wherever a person becomes entitled to property upon the death of another, if the death happen after the Act came into operation, notwithstanding that he became entitled under a disposition made before the Act came into operation. A testator made his will, leaving an estate to one for life and to the defendant in remainder, and died before the Act. The tenant for life came into possession, and died *after* the Act. The question whether the reversioner whose estate was thus *vested* before, but who did not come into possession *after* the Act, is exempt from duty, was decided in the negative. (*Att. Gen. v. Middleton*, 30 L. T. Rep. 323.)

LARCENY—Effect of Recommendation to Mercy by Jury.—T., being entrusted with the custody of a plate chest, opened it with a key he procured for that purpose, and pledged part of its contents for L.200. He was tried for larceny; but, in addition to the ordinary count, a special one was framed under the 4th section of the Fraudulent Trustees Act, 1857 (20 and 21 Vict., c. 86), which makes it larceny for the bailee of any property fraudulently to take or convert the same to his own use, although he shall not break bulk or otherwise determine the bailment. In the case under discussion, the insertion of such a count was wholly unnecessary, because the prisoner clearly had broken bulk, and the only question was, as to whether the *animus furandi* could be established so as to make the abstraction of the plate larcenous. The jury found him guilty on both counts; but they recommended him to mercy, believing—as they stated—that he intended ultimately to return the property. This recommendation induced the recorder, before whom the prisoner was tried, to state a case for the opinion of the Court—it being urged by his counsel that such a verdict and recommendation amounted to a negation of that intention to deprive the owner permanently of the property taken, which is essential to complete the offence of larceny. The Court of Criminal Appeal, however, were of opinion that the recommendation to mercy formed no part of the verdict, which was simply that of “guilty;” and they remarked, that to read the recommendation as part of the verdict, was to make the whole insensible. All that the judge meant to say was, that they thought that, at some time or other, and after the property had been stolen, the prisoner had intended, at some future time, to restore it; but, said the Court, every thief who pledges stolen property has, and may probably have, such an intention. The Court further intimated that a recommendation to mercy ought not to induce the judge who tries a prisoner to state a case for the opinion of the Court for the consideration of reserved points.—(*Reg. v. Trebillock*, 6 W. R. 281.)

THE

JOURNAL OF JURISPRUDENCE.

OFFICIAL INQUIRY IN CASES OF SUDDEN DEATH.

It happens somewhat singularly that, while considerable dissatisfaction has been felt for some years past with the manner of conducting Coroners' inquests in England, the Scotch public have been gradually coming round to the opinion that greater publicity is requisite for the ends of justice, in the corresponding class of criminal investigations here. We cannot well be charged with anything like a blind reverence for English law, or English forms of procedure; and we are far from wishing to say that a Coroner, elected by the rate-payers of some petty village or rural district, is likely to be better qualified than our procurators-fiscal, for inquiring into cases of sudden or mysterious death. There is not the least necessity for importing the details of English practice into our legal system, already sufficiently encumbered with foreign technicalities. We are perfectly satisfied, however, that without creating a single new office, or adding in any appreciable degree to the duties which our county officials are at present bound to undertake, it is quite possible to secure for Scotland the inestimable advantages of publicity in respect to the preliminary inquiries into this class of fatal casualties.

It was generally supposed that the enactments of the Scotch Registration Act (1854) had provided the means of bringing all cases of sudden death under suspicious or unknown conditions, before the proper authorities; and to a certain extent this is true. Intimation of the decease of all persons found dead, either out of doors or in localities where they are not personally known, must be sent to the procurator-fiscal of the county, who is directed to make such investigation as he may think necessary, and to report the result to the district registrar. It must, however, be obvious that these provisions afford no adequate security that a proper inquiry will always be instituted. It has been often asserted, of late years,

by medical men of the highest respectability and eminence, in pamphlets, by the newspaper press and their correspondents, and it is within the knowledge of every one who takes an interest in public matters—that deaths do frequently occur which can only be accounted for on the supposition of suicide, neglect, or foul play; and yet the general public never come to hear anything about them. No doubt it must be a delicate and often a fruitless task to attempt to penetrate the secrets of occult and desperate crime; and, as any inquiry by the procurators-fiscal in Scotland must proceed upon the supposition of criminality, as the basis of their interference, we cannot wonder that these officials should feel the responsibility too great for them, except in cases which occur in the lower grades of society, or where suspicion is so strong as to amount to a *prima facie* case against an individual. The position of friends and neighbours is even more critical. For it must not be forgotten that, in two-thirds at least of all the cases of suspiciously sudden death, the result of an inquiry will go to prove that no blame attaches to any one; and hence those who might be anxious to communicate suspicions of ill-usage have to consider, in the first place, the consequences, as respects their own reputation and interests, of giving information which will always be interpreted as a conveying a covert imputation of criminality, in case the investigation should bring out nothing but the details of some fatal accident, or death by suicide; or from some latent infirmity. To a medical man, indeed, the consequences of taking a single unguarded step in this direction would be utterly ruinous. Hence there are few practitioners of any experience that cannot tell of more than one fatal casualty having fallen under their own observation, where the magnitude of the responsibility, quite as much as the want of legal evidence, has deterred them from coming forward to make a public disclosure of the circumstances.

It is obvious that the defects of our Scotch method of inquest arise mainly from the circumstance that we begin our inquiries at the wrong end. Instead of calling on the public prosecutor, at this early stage, to take a precognition as for a charge of *murder*, the object should simply be to ascertain the cause of death by means of a public trial conducted by some neutral authority. The very mention of an investigation by the procurator-fiscal, under the present state of our law, into the circumstances attending the decease of any respectable person, is calculated deeply to wound the feelings of relatives, and to give rise to all sorts of painful rumours. Nothing but the strongest sense of duty will therefore be likely to induce these functionaries to interfere, so long as their inquiry must wear the form of a quasi-criminal proceeding. In England a Coroner's inquest is, of course, regarded as a very unpleasant formality—intruding, as it does harshly enough, upon the sanctity and the decorum of domestic affliction; but we are not aware that ideas of a more painful nature are usually associated with this form of inquiry.

leed, the very fact that a public inquiry is *inevitable* in all cases mysterious or accidental death, must tend to relieve the inquiry a much of the opprobrium of a criminal investigation; while the dict of the Coroner's jury, supposing the cause of death to be accidental, would effectually counteract or allay any suspicions of a sinister tendency that might have arisen. Under the English system, nothing more is implied in the idea of an inquest, than that death has occurred, of which the cause is not natural (*i.e.* *accidental* or homicidal), or else *unknown* to the medical attendant of the deceased. In either case, the public have clearly an interest to ascertain the cause of a life being lost to the community, and none more properly interested in discovering the truth of the matter than the friends of the sufferer. No blame can attach to the Coroner interfering where no discretion is allowed to him, and all parties content to submit to the investigation, viewing it simply as an unpleasant necessity intended solely for the safety of society, and for protection of human life.

The complaints to which we have alluded, as prevalent in England, relate rather to the *status* of the Coroner and the administration of his important duties, than to the principle of public inquests. It is said that, in some instances, these functionaries have caused annoyance to families by taking up cases of death from natural causes, where there was really no ground for an inquiry. Such conduct, of course, is inexcusable; but it may be accounted for, perhaps, under the English system of paying these officers by fees, which gives them a direct interest in interfering as often as possible. There is reason also to fear that the office has fallen, in some towns, into the hands of an inferior class of men. No law reformer would wish to re-enact in this country the scenes of the Rugeley inquest, with its presents of game given and received, and its amicable interchange of compliments between the suspected murderer and the presiding magistrate. In America, also, we were lately presented with an example of a Coroner, in a large city, assuming the functions of the public prosecutor and brow-beating witnesses with all the zest of a Jefferies or a Buller. On the other hand, there can be no doubt that the Coroners for the counties and larger towns in England are men of the highest respectability and standing—one of them, the present Coroner for Middlesex, having been a member of Parliament for many years. We scarcely think, however, that any objection to the system could fairly be raised amongst ourselves, on the score of there being any difficulty in finding men qualified to fill the office.

In fact, we see no reason why the duties of Coroner in Scotch counties should not continue to be discharged, as they have hitherto been, though to a too limited extent, by the procurator-fiscal as representing the Sheriff. The manner of the investigation, we hold to be comparatively of small importance. We must confess to a partiality for the system of inquest by a jury, and there can be no doubt that this method has worked admirably in the sister kingdom. But

the essence of the contemplated reform, by whatever machinery it might be carried out, would be limited to two points. *First*, We would deprive the procurator-fiscal of all arbitrary discretion in the matter of prosecuting or refusing to prosecute such inquiries, and oblige him, under suitable penalties, to hold a court of inquest upon receiving a written intimation from any qualified medical practitioner stating that so and so had died suddenly, and that the cause of death was unascertained, or on receiving an equivalent representation from one or more respectable householders in the neighbourhood. *Secondly*, Means should be taken to secure publicity, in so far as consistent with decorum and with the nature of the inquiry. Were these two elements—of *certainity* and *publicity*—once secured, the investigation might, in other respects, safely be left to take care of itself. Only let the public have access to the evidence, and prosecutors will be sure to find out that it is for their interest, as well as their duty to get up their cases efficiently. The ability with which criminal investigations are conducted in our country is well known; the only danger to be apprehended is the chance of prosecutors overlooking a case altogether. In throwing out these suggestions, we do not, of course, propose to supersede the jurisdiction of the Sheriff. In the Glasgow poisoning case, it was emphatically declared by the Court to be the duty of the Sheriff, in all cases of murder, to conduct the precognition of all the important witnesses. We believe this view of the jurisdiction of Sheriffs to be in accordance with the oldest traditions of our criminal system. Indeed, unless we are much mistaken, the title of *Coroner* belonged to the Sheriffs by our ancient style. It is certain at least that the magistrates of royal burghs, who exercised the functions of Sheriffs within their own towns, are styled Coroners, or “Crownors,” in the ancient charters of incorporation. It may be superfluous to observe, therefore, that wherever the *post-mortem* investigation related to a charge of murder, it would be the duty of these magistrates to conduct the inquiry personally, as they have hitherto been in the practice of doing.

We daresay there are, among those who are not practically conversant with the working of our criminal system, many excellent people who will maintain that there is no need for any change of the kind suggested, and that our system of prosecution by a public officer supersedes the necessity of a public preliminary inquiry. To those who disbelieve in the possibility of cases of homicidal death being overlooked by the authorities, we can only reply that the question is one of fact, and any lengthened statement of actual cases in which names and dates must, for obvious reasons, be suppressed, would be unsuited to the character of this journal. We may, however, refer to a very excellent pamphlet on this subject, published in 1855, by a medical practitioner, Mr James Craig of Ratho, in which are detailed a great variety of cases, some of them of the most startling description, which have fallen under the observation of the writer. The result of his experience seems to be that

less where the authorities are positively requested by the relatives of a deceased person to investigate the cause of death, they almost uniformly decline to interfere, no matter how notorious may be the suspicions of foul play, no matter how deep the interest of these relatives to stifle and elude inquiry.

One case only of flagrant neglect of duty may be referred to, because it tends to illustrate an important branch of the Coroner's duty, because also the truth of the story has been publicly admitted, and because the fact is recent, and occurred in the metropolis of Scotland, within the very shadow and precincts of the stronghold of justice, and possibly within a stonecast of the official residence of Her Majesty's public Prosecutor. At the monthly meeting of the Edinburgh County Prison Board, in April, a letter was read from a private gentleman, calling the attention of the Board to *two separate cases of mutilation*, which had recently occurred within the prison of Edinburgh, or while the prisoners were in custody there. One of these cases had terminated fatally, and the form of an inquiry had, it seems, been gone through; but of course nobody was to blame, and no steps, therefore, had been taken to bring the murderer to justice. It was by mere accident that the facts had come to the knowledge of Dr Alexander, who communicated them to the Board; and no one can doubt that, if the secret had remained in the keeping of the public officials, not the faintest echo of either story would have reached the public ear. Of one of the cases referred to we know nothing except the statement in the newspapers that the man, who was a lunatic, had his arm broken and his shoulder dislocated; but, the highly respectable medical gentlemen who officiate as surgeons at the police office and the prison are both certain that the patient was sound in body and limb while under their charge, and it is equally certain that he was found to be thus shockingly injured on his arrival at Morningside, the presumption is that he was maltreated while on the way from one place to the other. Surely there could be no difficulty in arriving at the truth in such a case, more especially as the man, though a lunatic, is alive, and if not an absolute idiot, can probably state who it was that inflicted the injuries. The other case is much worse than the last, and, though no detailed account of it has been published, we understand the facts to be as follows. The deceased, who in this case also was insane, had been sent to the prison of Edinburgh; but how far his mind may have been affected at the time of his committal, we have not been able to learn. It appears that, after the discovery of his unfortunate condition, he was put under the charge of two other prisoners, instead of having a turnkey assigned to him, and that next day he was taken ill, and removed in haste to the workhouse. The cause of his malady remained unknown until death had translated him into the custody of the powers, it is to be hoped, more merciful than his custodiers and fellow-prisoners in the Calton jail. It was then discovered, on an examination of the body, that death had been occasioned by his having

sustained a severe fracture of the ribs while in custody in prison.¹ It will hardly be credited in England that such mischief could be done within the walls of a public institution, and yet no public inquiry be made, no rumour allowed to reach the public until more than a month after the occurrence. One of the duties of the Coroner in England is to hold an inquest on the bodies of all persons dying in prison, and the governor is obliged to report such deaths to him. Supposing our law had been similar, can it be doubted that an investigation of this most atrocious case of culpable homicide before a magistrate and a public audience, would have proved infinitely more useful and more satisfactory to the public, than the result which actually happened, and which was that all ulterior inquiry was stopped by an order from the Crown Office?

There are many other matters relating to the investigation of crime and the preparation of medical evidence, which, had our space permitted, we should like to have noticed in connection with the subject. We trust that enough has been said to direct attention to the subject; and we would hope that the Lord Advocate, among the many useful legal reforms which he has promised, will not overlook that of his own department, or forget the defective state of the law in regard to criminal investigations.

CIVIL AND CRIMINAL JURISDICTION.

SUSPENSIONS.

THE existence in Scotland of two supreme courts of review, one civil, and the other criminal, has created a difficulty with respect to suspensions, which is of frequent occurrence in practice.

The right of controlling inferior judges is inherent in both the Court of Session and High Court of Justiciary. The form of process which was formerly in common use for this purpose was advocacy; now it is that of suspension—a form of proceeding of more extensive application than is warranted by the definition given by the older writers.

Till very lately the Court of Session was in the practice of correcting all irregularities or excesses of authority whatever; and down to the beginning of the present century, instances are to be found of their having, either themselves altered sentences in criminal matters, or of their having advocated the processes, and remitted them to the Court of Justiciary.¹ The tendency, however, which arose during the last century, to limit the criminal jurisdiction of the civil courts, and to confine them to their proper sphere, soon led to a limitation of their authority, and to a corresponding

¹ Stair (writing in the 17th century) describes the Court of Session as the only court having power to advocate or suspend sentences of inferior courts (Stair, iv. 1, 35).

ension of that of the Court of Justiciary. Erskine confirms Stair's doctrine as to the older practice, and adds, that "since the reformation of the Court of Justiciary by the Act 1672, the commissioners, who apprehended themselves to be vested with as high a jurisdiction in criminal matters as the Court of Session are in civil, have been free to advocate criminal causes from inferior courts to their own, on whatever ground, without the interposition of the Court of Session" (Ersk. i. 3, 27).

For a while both courts appear to have exercised a co-ordinate jurisdiction in advocations and suspensions in matters criminal. It was not long, however, before it was discovered to be an unnecessary application to bring such suspensions to the Court of Session, and thereafter to have them remitted to the Justiciary Court, if the Justiciary Court were competent at once to exercise powers of review. The Court of Session began to decline entertaining certain suspensions, and it was held to be the court of review in civil matters only, the Court of Justiciary being held to be the court of review in criminal matters. From this period—no rules having been given to determine what in the question of jurisdiction were civil matters, and what criminal—there has been often great doubt and perplexity in determining in which court a suspension should be brought.

Till the passing of the recent Court of Exchequer Act (19 and 20 Vict., c. 56), the practitioner was sometimes puzzled which of the courts to select. Suspensions of charges to pay taxes and other revenue duties (not being penalties), were competent only in the Exchequer Court (*Brongh v. Stewart*, 20th December 1850, D. 408). The recent Act (sec. 21) takes away any difficulty in regard to this, by transferring all such proceedings to the Court of Session. As they all relate to matters which it is now settled to be of a civil character, there is little chance of any one thinking of bringing such suspensions to the Court of Justiciary.

The principle which should rule the question of civil or criminal jurisdiction, as first enunciated, was very simple. In all "properly criminal" matters the criminal court was to review, and in all "properly civil" matters, the civil court was to review. The difficulty lay in its application, it being by no means easy always to say what was criminal and what civil. Where the conclusion of an action is for payment of a sum of money, the action is in general civil. But the payment of a sum of money is frequently made the punishment of an offence, and criminal matters are often made the ground for a demand of money in name of damages. Doubts arose which court had the right of review in these two classes of cases. To decide this, the principle was adopted, that where the sum was demanded in *vindictam publicam* (that others might be deterred from the like offences in future), the criminal court had jurisdiction; and that where the sum was demanded in *privatum solatium* (as reparation to a private party), the civil court had jurisdiction. This principle was found to extend the jurisdiction of the Court of

Justiciary more than was necessary. Actions prosecuted in *vindictam publicam* were therefore subdivided, according to the nature of the offence which was to be punished. The case of *Campbell v. Young* (24th February 1835, 13 S. 535) forms an era in this department of law. In an able pleading by Lord Ivory, then counsel for the suspender, he introduces into Scottish law the well-known division made by ethical writers of offences into *mala in se* and *mala prohibita*. So obvious a distinction came rapidly to be recognised, and numerous decisions have since been given, in which it has tacitly or expressly formed the ground of judgment. In the pleading above referred to, a *malum in se* is explained as that which offends "not less against the law of God than against the law of man." *Mala prohibita* therefore offend against the law of man, but not against the law of God. Subsequently, the word *malum in se* has been frequently used as synonymous with an "offence at common law," and *malum prohibitum*, with an "offence against statute law," or a "breach of statutory regulation:"—thus proceeding upon the idea that everything evil in itself is punishable at common law, if punishable at all.

It is much to be wished, that an important question like that of jurisdiction had not been made, in many cases, to turn upon a division so little capable of intelligent explanation. Offences against the excise laws are among the most commonly instanced *mala prohibita*; and certainly they are not prohibited by the common law, nor, in so many words, by the written law of God. But the difference between a breach of the excise laws and a breach of the law against swindling, seems to be little more than the difference between cheating the state and cheating a private individual. As was observed by Sir Frederick Pollock, in a recent English case, "It is difficult to distinguish between endeavouring by concealment and fraud to prevent that from being paid which is necessary for the public service, and by similar fraud and concealment depriving one of her Majesty's subjects of that which is his lawful right and due" (*Attorney-General v. Radloff*, 14th June 1854, 23 *Law Journal* Exch. 240). Another instance of *malum prohibitum* frequently given, is that of infringements of the law for the protection of salmon fishings; but it is impossible to see in what respect illegally injuring rights of property of that description differs from illegally injuring other rights of property. Lord Ivory, to whose ingenuity as counsel we are perhaps indebted for the distinction, afterwards as judge goes even farther against it than we are disposed. "But what the law declares to be an offence," he remarks in the case of *Stevenson and Scott* (8th September 1854, 1 *Irvine*, 612), "there must, *in genere*, be implying a defiance and infringement of the law, be criminality in committing." And in regard to this matter of game laws, it may be subject of reasonable wonder to the unskilled, to determine why poaching in water has been held to be a *malum prohibitum* (*Park v. Earl of Stair*, 12th January 1852, *J. Shaw*, 532), and poaching on

and a *malum in se* (Russel v. Sprot, 18th November 1844; 2 Broun, 21). The division of offences into *mala in se* and *mala prohibita*, as however been adopted in practice, and it is in general not very difficult to draw.

In considering the course of decisions subsequent to the case of Campbell and Scott, it will be convenient to classify them according to the principles they embody.

I. As a general rule, where *mala prohibita* are punishable by summary penalties, but not by imprisonment, except on failure to pay the penalties, the Court of Session is the proper court of review.

In the case of Campbell v. Young, the suspender had been imprisoned under a sentence of Justices of the Peace for an offence against the Hawkers' Act (55 Geo. III., c. 71). The offence labelled as that of vending wares without a license. The statutory penalty is the forfeiture of L.10, and for non-payment thereof imprisonment as a common vagrant. The proceedings in the inferior court were informal, and Campbell brought a suspension in the Court of Session. The respondent pleaded, *inter alia*, that it was the Court of Justiciary which was alone competent to interfere, and rested his argument strongly upon the use of the word "offence" in the statute. The suspender answered, that the statutory offence was not "*malum in se*, or in its own nature of a criminal character, so that, unless intended to be made so by the statute, the Court of Session must be incompetent." The Court of Session sustained their jurisdiction. Although unanimous as to this, the judges differed much in the grounds for the decision. The Lord Ordinary, Moncrieff, adopted a distinction suggested by the suspender.—"Here the thing to be prevented was not *malum in se*, which the common law could have dealt with as crime," and announced a principle which has since been fully confirmed, that, "in general, the nature of the thing prohibited by special statute under penalties, should be more regarded than any particular word applied to it." In the opinions of the Inner House judges, the word *malum in se* is not mentioned; and though they are not very distinct, they appear to have rested their judgment upon their right to grant liberation in every case of unauthorized imprisonment. The Lord Justice-Clerk, Boyle, indeed, mentions the words "statutory offence;" but nearly the whole of his opinion would have equally applied to a case of illegal imprisonment under a statute punishing *mala in se*.

In the same year an instructive case occurred in the Court of Justiciary (Dunlop v. Hart, 20th June 1835, 13 S. 1173). Dunlop was prosecuted by Hart, the Procurator-Fiscal, before the Justices of the Peace, for publishing hand-bills without the printer's name, in contravention of the Act 39 Geo. III., c. 79, and having been convicted, brought a suspension before the Court of Justiciary. Hart objected to the competency of the jurisdiction, and his objection was

sustained. The opinion of the Justice-Clerk proceeded on the ground of its being a civil process, and of Hart having in reality prosecuted, not as procurator-fiscal but as a private informer. The other judges, without expressly saying so, sanctioned the idea that a *malum prohibitum*, at all events in the case where the penalty went to a private informer, could give rise only to civil proceedings. We cannot see how it can affect the jurisdiction, into whose pocket the penalty is paid. The penalty is equally *ad publicam vindictam*, and imposed for the purpose of repressing the offence, whether it go to the public prosecutor or not, as it cannot surely be said in any case to be imposed *in privatum solatium* of the private informer. The fact of the legislature extending the right to prosecute an offence to every one, proves, if it proves anything at all, that the legislature thought the offence one which it was more than usually desirable to repress.

More than one case has arisen in reference to the laws relating to the sale of spirits. That of *M'Donald v. Gray* (17th Feb. 1844, 2 Broun, 107), is valuable as giving a distinct confirmation to the two last-mentioned decisions. It was the case of an offence against the Act 6 Geo. IV., c. 80, committed by exposing spirits for sale without a license. The Lord Justice-Clerk, Hope, quoted, with approbation, the opinion of Lord Moncrieff as to *mala in se* in *Campbell's* case, and, the rest of the Judges concurring, the objection to the jurisdiction of the Justiciary Court was sustained.

In *Addison v. Stevenson* (22d July 1848, Arkley 505) the suspender had been convicted of selling drink at unseasonable hours, in violation of the Home Drummond Act, 9 Geo. IV., c. 58. The Court of Justiciary sustained an objection to their jurisdiction. The case of *Gardner v. Porter* (17th Nov. 1856, ii. Irvine, 522) confirms this decision. It was a suspension of a conviction under the Forbes M'Kenzie Act (16 and 17 Vict., c. 67), which had been brought to the Court of Justiciary. A clause in the act provided that offences against it are to be prosecuted in the same manner as offences against the Home Drummond Act; and the Commissioners of Justiciary held their jurisdiction excluded. Numerous cases have since occurred in the Court of Session, where jurisdiction in cases under the Forbes M'Kenzie Act has not been disputed. As an example of the application of the principle to another class of *mala prohibita*, may be cited the case of *Campbell v. Strathearn* (22d Nov. 1847, Arkley 386), where the offence was one created by the Road Act, 1 and 2 Will. IV., c. 43. Campbell had, it seems, been amusing himself with the game of "long bowls" on the public road. The Court of Justiciary held that it had no jurisdiction. The suspender had a separate plea, that authority to prosecute having been conferred on the procurator-fiscal as well as the road trustees, showed that the matter was considered as criminal. We have already stated, that we cannot see how it could affect the jurisdiction who prosecuted for

he fine or who got it, and in this case the Court seem entirely to have disregarded the special plea.

On the same principle, the case of *Park and Others v. the Earl of Stair* (12th Jan. 1852, J. Shaw, 532), was decided by the Court of Justiciary. The offence libelled was that of killing a salmon, in a river, without the consent of the proprietor of the fishings, in contravention of the Solway Fishery Act (44 Geo. III., c. v). The Justiciary Court held that they had no jurisdiction to view a conviction for such an offence.

These form a sufficiently numerous and consistent chain of decisions to leave, we consider, little doubt as to the general principle. It must, however, be remembered, that there are many cases where special clauses in statutes prevent this principle having operation. Examples may be mentioned, the Weights and Measures Act, 5 and 6 Will. IV., c. 63, sec. 38, and the General Police Act, 13 and 14 Vict., c. 33, sec. 369, both of which give a privative jurisdiction to the Court of Justiciary to review convictions for all the offences against which they are directed.

Although the statutory offences of which we have spoken above, are to be regarded in a question of jurisdiction as civil matters, to guard ourselves from misconception, we may explain, that nevertheless they are not so viewed in every question. Thus, in *Lawson v. Jopp* (16th Feb. 1853, 15 D. 392), it was held, that the penalties imposed were not civil debts, within the meaning of the small Debt Act, 5 and 6 Will. IV., c. 70, and that accordingly, it was competent to imprison for non-payment, even when the amount was below L.8, 6s. 8d. And it was decided by Lord Ivory, that a suit for penalties under the Tweed Fishings Act, was not a civil suit within the meaning of the Amendment of Evidence Act, 16 Vict., c. 20 (*Stevenson v. Scott*, 8th Sept. 1854, i. Irvine, 603). Parts of this Lordship's opinion go much further, but the case decides no more.

II. In general, where statutes make *mala prohibita* punishable by imprisonment or other corporeal punishment in the first instance, without the alternative of a pecuniary penalty, the court of review is the Court of Justiciary.

The law is here held to make the offence a criminal offence. The point was decided with reference to the Act 17 Geo. III., c. 56, by the case of *Robertson v. Bisset* (21st May 1829, 7 S. 633); and again more distinctly, with reference to the general point, in the case of *Asbury v. Bell* (18th Feb. 1836, F. C.), which arose out of a conviction under the Workmen's Act, 4 Geo. IV., c. 34. The offence in that case was desertion of service, which, at common law, could give rise only to a claim of damages for breach of contract. Some doubt was thrown on this principle in a recent suspension (*Young v. Townshend*, 24th Nov. 1856, ii. Irvine, 525), but it does not appear that the preceding decision had been noticed; and there was another ground on which the jurisdiction of the Court of Jus-

tiary might, in accordance with practice, have been held incompetent. The offence which could be punished criminally was an isolated offence, occurring in the midst of a statute (8 Vict., c. 15), containing civil provisions as to revenue matters; and there has always been a great inclination not to divide the jurisdiction competent to review convictions under any one statute.

III. Where *mala in se* have been placed in statutes along with a much larger class of *mala prohibita*, and made punishable like them by pecuniary penalties, and not by imprisonment, except on failure to pay the penalties; and where the prosecution is clearly for the statutory penalty, and not for punishment at common law, the Court of Session is the proper court of review.

This exception to the general rules has been introduced apparently to avoid the inconvenience of having a divided jurisdiction to review the convictions under one statute. An important decision, in which it was recognised, was that of *Phillips v. Steel* (12th January 1847, 9 D. 318). The suspender had been prosecuted by the respondent, the Procurator-Fiscal, before the magistrates of a burgh, for selling spirits during divine service on Sunday, keeping his house open at unseasonable hours, and not maintaining good order and rule therein. The complaint did not set forth any statute, but the citation and conviction were in terms of the Home Drummond Act. The suspender brought a suspension before the Court of Session, and the respondent objected, that the prosecution was of a criminal nature. The objection was repelled. "The respondent," said Lord President Boyle, "is not entitled to say that this is an offence at common law. It, no doubt, is so, but it is not so charged here." Lord Mackenzie's opinion is to the same effect. "The point (as to jurisdiction, he says), therefore, depends on the nature of the regulation and the punishment." And Lord Fullarton remarked, that "however criminal the facts were, it was only as *mala prohibita* that they could be made the subject of discussion in that Court under the petition." The opinions of the Lord Ordinary and of Lord Jeffrey were similar. We have thus a unanimous decision, and the doctrine is also, to a certain extent, embodied in a previous case, before the Court of Justiciary, that of *Somerville v. Henman* (1st June 1844, 2 Broun, 220). The suspender had been convicted by the Justices of Peace for contravention of the Act 5 and 6 Vict., c. 107, relative to emigration. Certain of the acts libelled against him had been clearly *mala in se*, but the greater number were *mala prohibita*. The Court were unanimously of opinion "that the present case fell to be regulated by the precedents referred to, inasmuch as the petition and complaint with which the proceedings originated, was of the nature of a civil suit for penalties, and not of a complaint for any offence punishable criminally."

IV. It forms, in some respects, a converse to the preceding proposition, that there are instances of mere *mala prohibita* punishable

pecuniary penalty, but not by imprisonment, except on failure to pay the penalty, having been held to belong, in the matter of jurisdiction, to the Court of Justiciary.

This has happened in the case of convictions under the Day Poaching Act (2 and 3 Will. IV., c. 68). An objection to jurisdiction was stated in *Russel v. Sprot* (18th November 1844, 2 Broun, 21). The Commissioners of Justiciary, "looking to the criminal character of the proceedings which the statute was intended to repress, and judging especially from the preamble of the Act, having expressed a decided opinion," that the objection was bad, it was not pressed. There is not one of the offences prohibited by this statute, which could have been punished at common law; and not one, which the statute empowers to punish by imprisonment in the first instance. The criminal nature of the proceedings can be inferred only from this, that somewhat similar proceedings are punished criminally by the Night Poaching Act. As regards the preamble of the statute, the words relied on apparently are, that trespasses in pursuit of game, are sometimes "attended by acts of violence and intimidation." If every act, which is sometimes attended by violence and intimidation, is to be held as criminal, our catalogue of crimes will be alarmingly increased. Universal practice, both before and since this decision, confirm it, however exceptionable it may be in point of principle.

V. Where statutes are directed solely to the punishment of *mala se*, the fact of no power being granted to imprison, except on failure to pay a pecuniary penalty, does not render the jurisdiction of the Court of Session competent.

Before the line between the jurisdiction of the civil and criminal courts had been more strictly defined, it was a common idea, that where a prosecution for a properly criminal act had ended in a pecuniary penalty, the cause was thereby rendered civil (*Erskine* I. iii. 1). Of course, it was not difficult to see, that the exercise of the discretion of an inferior judge, in pronouncing sentence, could in no way affect the nature of the action, or the rights or jurisdiction of the superior Courts. The question is more difficult where the law gives power to pronounce only a civil sentence, because then it may be plausibly argued, that it was the intention of the legislature to render the whole matter civil. Cases of this kind seldom occur. There was one in 1828, in regard to the statutes against Sabbath-breaking (*Jobson v. Lambert*, 29th Nov. 1828, 7 S., p. 83). The advocates had brought an action before the Sheriff against the respondent for acts of alleged Sabbath-breaking, concluding for penalties and for interdict. The statutes libelled gave no power to imprison, unless as a means of enforcing payment. The case was carried by advocacy to the Court of Session. An objection being taken to the competency, it was argued, and avizandum made. On advising, the advocates stated their willingness to pass from the conclusion for penalties. Lord President Hope said—"But if the cause was originally criminal, you cannot con-

vert it into a civil process." Lord Gillies,—“The proper question is, whether this is an action of a criminal nature. If so, then we have no jurisdiction.” The other judges concurred, and the report concludes, “The Court, accordingly, being of opinion that the action was of a criminal nature, refused the bill as incompetent.” This case may be held as decisive, more especially when we consider that the decision in the case of the Day Poaching Act, already mentioned, proves conclusively, that the fact of no power being given to imprison in the first instance, does not, *eo ipso*, render the jurisdiction civil.

We regret that we have not been able to reduce this matter of jurisdiction to clearer principles. But we shall be content, if what we have written show, in any degree, how desirable it is that our civil and criminal procedure should be revised and consolidated into one consistent system. “For,” as Lord Meadowbank once remarked, “there is no such evil as uncertainty in the rights of jurisdiction. It is even beyond that of uncertainty in the law, which is nevertheless stigmatised by the uncontroverted maxim, *pessima est servitus quum lex vaga aut incerta*.”

THE PROFESSION AND CONTEMPLATED REFORMS.

THE time has come for the profession to consider the proper attitude to assume regarding those inroads on their professional emoluments with which they are threatened. The many recent changes in the law have already caused large pecuniary sacrifices to Scotch lawyers; and the whole tendency of events is in the same direction. It is now quite impossible to shut our eyes to the necessity, or refuse to hear the cry for law reform, which rises on every side. It has become absolutely essential. The public *will* have law cheapened and simplified as far as possible; and in no department is the desire more earnestly or pertinaciously pressed, than in the matter of titles to land. If the lawyers will not effect this for the people, they will take it into their own hands. Obviously, it is much better that a movement of such vast importance should be intrusted to the guidance of skilled and experienced practitioners, than those rash and inconsiderate empirics, who, if they had the power, would reduce everything to chaos. Such are the men who would make the transfer of land as easy as the transfer of stock—a result which, so long as geographical position is as essential an ingredient of property as superficial extent, can never be attained. Our public men, feeling the public pulse, readily accede to a movement it is impossible to withstand. With them law reform is a favourite political card. It violates no party traditions—involves no inconvenient platform pledges—and is perhaps the readiest of all means, at the

present moment, of securing popular favour. Moreover, we may safely rely, that in proportion as a party is down in the popular scale, the more earnest will be their endeavours to rise by means of the above facile medium. It seems, therefore, to be the proper time for the profession to consider what policy they are, in these circumstances, prepared to pursue. We repeat the opinion we have often before expressed, that anything like organized opposition would be hopeless. Submission to inevitable results is manifestly the best course that can be pursued, when of this inevitable character is no longer doubtful. But while this is doubt true, much may, at the same time, be done for our common interests, by their being firmly, fairly, and properly, represented. If surrender is a necessity, we are at least bound to use every endeavour to have it effected on the best terms which can be obtained.

This duty has in past years been greatly overlooked by the profession in Scotland. They have been too passive. Their policy has been altogether negative. They have tamely submitted to reforms, which might have resulted very differently if they had been more disposed to speak out their real feelings. We hope that we shall see no more of this inactivity. "Stand by your order" is one of the first maxims of every professional man—and, in point of fact, it is invariably acted on by every class but ourselves. The lawyers are by no means the least violent, when the temporalities of their Zion are threatened. Medical men are certain to make themselves heard on the platform, and through the press, when their rights and privileges are in danger. The lawyers only are silent and indifferent, when the Legislature thrusts its rude hand into their pockets, and, in name of the public interest, deprives them of many thousands per annum. Would any other body have submitted, without even a grumble, to give up £25,000 a year, as they did, in 1838? Like their English brethren, the Scotch lawyers could make themselves heard on public questions, as contemplated from a professional point of view. The lawyers of England, whenever a bill is introduced in the least degree touching their professional interests, cry aloud, and spare not. Their points of defence may be few, and the garrison feeble, but the noise they make frightens off their assailants, or, at the very worst, the resoluteness of their opposition drives the Government into a compromise. The difficulties and obstacles they interpose, are not overcome, but their opposition is "bought up." They resist till the stronger power is brought to their own terms; and their peace is purchased at a considerable annual expense to the country.

Of this, the most recent and remarkable case, was that of the English proctors. The statute of last Session, establishing the new Court of Probate, and abolishing the *monopoly* of the proctors (for it did nothing more), contains the following singular section:—

"Sec. 105. Whereas the fees or emoluments of the persons now

practising as proctors in the Courts, now exercising jurisdiction in matters and causes testamentary, may be damaged by the abolition of the exclusive rights and privileges which they have hitherto enjoyed as such proctors in such Courts: Be it enacted, that the Commissioners of Her Majesty's Treasury, by examination on oath, or otherwise, etc., may inquire into, ascertain, and absolutely determine the net annual amount of the profits arising from the transaction of business by proctors, in matters and causes testamentary, on an average of five years immediately preceding the commencement of the Act, or of such proportion of five years as shall have elapsed since each and every such proctor was admitted to practise in such Courts; and shall award to each and every such proctor a sum of money, or annual payment, during the term of his natural life, of such amount as shall be equal in value to one-half of the net profits derived by such proctor, in respect of matters and causes testamentary upon the said average of five years immediately preceding the commencement of the Act, or of such proportion of the said five years as shall have elapsed since the admission of each and every such proctor to practise in the Courts now exercising jurisdiction in matters and causes testamentary."

Sec. 106. Compensation to proctors in partnership.

Though we have no reason to believe that the claims of the profession in Scotland will ever be so favourably considered, it may be interesting, at this moment, to recal the grounds on which the right of the proctors to compensation was founded. The abolition of the testamentary jurisdiction of the ecclesiastical courts, and its transference to the new Court of Probate, in which all solicitors are allowed to do business, did not involve the professional extinction of the proctors. On the contrary, they still retain a large part of their peculiar business in the Admiralty Courts, Ecclesiastical Courts, etc., and all that the Bill did was to abolish their monopoly in the matter of obtaining probate and grants of administration. In return for this, they were made solicitors and attorneys. There was, therefore, much force in the remark of the Attorney-General, in bringing in his abortive Bill of 1855 (which, like every other measure on this subject, contained a provision similar to the one in the statute now in force), that "he believed that the apprehensions of loss of these gentlemen would turn out to be unfounded; and that, when they emerged from the shade of Doctors Commons into the light of day, and exercised their profession on a more extended arena, their experience, skill, and sagacity, would enable them to compete successfully with solicitors now practising their profession in Westminster Hall." Not a doubt of it. Even, if it were not so, there are very few professional men who would not be disposed to retire from business, and all its fatigues, anxieties, and risks from failing health, caprice of clients, etc., on being guaranteed an annuity of one-half of their existing professional profits for the rest of their lives. And yet the country is now saddled with the cost of maintaining between two and three

hundred of these wealthy stipendiaries, most of whom appear to be ill in the profitable practice of their profession in Sir C. Cresswell's new court. "Business (said the Attorney-General on August 3, 1857, in discussing this subject) generally continued to run in the channel in which it had continued to run—in the channel in which it had been in the habit of flowing for a number of years; and he seldom found that any gentlemen who were employed in any particular occupation had had the resort to them diminished by a change in the practice of the courts, with which they were threatened." Now, the branch of Scotch practice, which is in the greatest demand at present, is the most lucrative of all—that of Conveyancing. The Lord Advocate has brought in his Bill. It goes a considerable way; but it may be that it is only the beginning of the end. The abolition of the double tenure will be a slow process, but assuredly some time will come when a man's right to his land will be contained within the four corners of a sheet of stamped paper. These changes, repeated, are completely beyond the control of professional men; unless lawyers accept the duty, however disagreeable, of adapting their practice to the requirements of the age, the innovations will be made by less experienced and more irreverent hands. An old feudalist may look upon those who would modify the existing system of feudal rights, even in the smallest degree, as a generation of reactionaries; but others, studying the flow of public opinion, regard moderate innovations as both prudent and necessary. It is no doubt difficult for any one to see the necessity for reforms, which would reach to a very serious extent upon his income. The case resembles that which was compared to the difficulty of a camel going through the eye of a needle. That the changes suggested upon conveyancing practice would affect, in all cases to some extent, and in many cases to a very great extent, the incomes of law agents, is beyond dispute. It is impossible to make even an approximation to the total sum, but the amount may be imagined, when we state, that the abolition of the instrument of sasine, and charters by progress, would diminish the incomes of a few legal firms in Scotland by several thousands per annum. It was stated that the mere shortening of deeds under Lord Abernethy's Act affected one firm in Edinburgh to the extent of upwards of L.1000 per annum. Agents whose business is less extensive will feel the pressure in a proportionate degree. So far, therefore, as hardship upon individuals is an element in determining whether compensation shall be granted, there never was a clearer case. While many firms will suffer very seriously, the business of some will be swept away altogether.

Now, how is this loss to be made up? By compensation? The Scotch conveyancer is as much entitled to compensation as the English proctor; but that case is one on which we fear very little reliance is to be placed. Their position was peculiar. They were well represented in Parliament, which Scotch convey-

ancers are not; and, instead of making only modifications in their practice, the abolition of the Probate Act was in a certain sense total. The proctor expired, and reappeared a solicitor. Nevertheless, the compensation they received was undoubtedly a departure from the prior practice of Parliament. It was a favourite principle of Sir Robert Peel to make compensation the condition of all reforms in the law; but the objects of his considerate bounty were not persons only in some degree, more or less, injuriously affected by the changes proposed, but those who lost their accustomed means of making a living. For example, the effect of late reforms in England was to destroy, in a great measure, the business of special pleaders. No compensation was given to them. The County Courts made ruinous havoc in Westminster Hall; but the case of the unfortunate sufferers, barristers or attorneys, was never once taken into account. It was stated, that at one of the Welsh circuits last year there was only one civil case on the list, and the County Court judge had no fewer than 400 on his roll. And many other cases of a similar kind might be mentioned. In this country, the only instances of compensation with which we have ever been made acquainted, are the abolition of a sinecure, or some unnecessary public office. Here, however, it is to be observed, the ground on which public money is expended, is essentially different from the case of a private party demanding reparation for the damage done to him by a general Act of Parliament. The public are dealing with one of their own servants, and the whole practice of the nation in this respect has been to pursue a liberal course, both with regard to superannuation allowances and compensation in respect of abolition. A notable instance must recur to every professional reader in the recent abolition of the sinecure office of Principal Clerk of Justiciary. And in such examples as these, we entirely uphold the practice which has been so long followed, that the holder of a public office, who is perfectly justified in anticipating a life interest in it, should be amply remunerated if the Legislature should step in and say that the office is no longer necessary. But examples are not wanting where what might be considered separate professions have been abolished; and in these instances also, compensation of some kind has been granted. The Admiralty practitioners, for example, found their occupation gone on the occasion of the transference of the Admiralty jurisdiction to the Court of Session; but they were amply compensated by being permitted to practise in the Court of Session, not only in Admiralty cases, but in all other actions competent in the Supreme Court.

In point of fact, view the question as we may, we must admit the justice of Mr Roebuck's observations, in *Hansard*, 3d vol., 1857, p. 982. Taking what he called a still harder case than that of the barristers and attorneys who have suffered by the introduction of the County Courts, he said—"When by the progress of machinery the hand-

loom weavers were thrown out of employment, they were left to starve, and though they applied time after time to that House for compensation, none was given. Take also the case of turnpike trusts, which had been injured by the railroads. Who ever thought of giving compensation for the pecuniary loss sustained by turnpike trustees? If they admitted the principle that compensation should be given in all cases in which private interests suffered by what was done for the public advantage, there would be an end to all improvement. It was one of the misfortunes attendant on public improvement that individuals were apt to suffer, but that in no way implied a right to be compensated." All this reasoning applies as much to the case of the English proctors as that of the Scotch conveyancer, and the answer is, that a different principle has only lately obtained the sanction of the Legislature. It would no doubt be said, however, that there are many points of distinction between the two. The business of a proctor is peculiar, and has now ceased to exist. Scotch conveyancers are not a separate and independent class. They are general law agents. All changes in the law beget business—if one department fails, they may take to another. This no doubt would be the line of argument taken on the other side; and we admit that there is much force in the fact of their being general law agents who will still have, whatever changes may be introduced into the making up of feudal titles, the practice of their profession open to them. That is of itself an amply broad ground of distinction to warrant the Legislature in treating them differently; and it is well to keep this prominently in view to prevent disappointment. It must also not be overlooked, that the alterations will only interfere partially with what is otherwise, and independent of the deeds proposed to be dispensed with, a lucrative branch of the profession. Were the case of the proctors to be cited in these circumstances, the answer would no doubt be ready, that the whole practice and emoluments of the general body of English practitioners have been most materially interfered with and diminished of late years, and no compensation either granted or demanded. The history of Scotch progress in legal reform would also be cited to the same effect; and it certainly shows that, while great alterations, involving very considerable diminution of emoluments to all branches of the profession, have taken place both in court practice and in conveyancing, no claim of compensation has ever on that ground been entertained by the Legislature.

But the main ground upon which any claim by the agents in Scotland should rest, is that the proposed interference with their emoluments is entirely exceptional. It will in some cases go far to destroy flourishing businesses, and in many other instances inflict very serious pecuniary loss upon individuals. The claim will, therefore, not rest so much upon mere hardship to individuals as upon the severity of the pressure, which may be said to be quite unprecedented in the history of law reform. Hitherto, when changes were intro-

duced, if one portion of procedure was abolished, another was added; and although, upon a balance of the whole, the emoluments of the profession might have been lessened, still the loss was not so severe as to lead professional men, themselves anxious, in a commendable spirit of patriotism, for rational reform, to make any public outcry by reason of the damage they sustained. The shortening of bonds, and making registration equivalent to infestment, interfered at first most materially with professional interests; but there can be no doubt that such a change had a tendency to increase the number of bonds, and if a balance were now struck, we believe it would be found that the profession on the whole have been gainers. If, however, the contemplated abolition of certain feudal deeds be carried out, there can be no equivalent. That source of professional emolument is struck off for ever. It is quite true that conveyancers in Scotland are not a separate section of the profession; but, on the other hand, there are businesses wholly derived from conveyancing, and practically standing in the same position as if there had been a professional barrier separating the court practitioners from conveyancers; and in such cases we have no hesitation in saying that the hardship inflicted will be every whit as severe as the loss to the proctor. Is the one, then, to have compensation, and the other none?

In the event either of no compensation being granted, or of law agents not seeing their way clearly to demand it, there are other questions in connection with the subject which ought not to be overlooked. If the whole titles in connection with property are to be reduced to dispositions and services, it would be but fair and reasonable that a higher rate of fees ought to be allowed to the practitioners for preparing these deeds. At present, when the titles are unnecessarily numerous, the professional fees for each are necessarily comparatively reduced. But if professional men are to take the whole responsibility of a transaction, they must be remunerated at a rate which will cover their risk, as well as be somewhat in keeping with their position. Now, it can scarcely be anticipated that the abolition of certain titles will create such a stimulus in the transfer of land, as of itself to indemnify the practitioner for the proposed innovation. There may, and we believe there will, be an increase in the number of transactions. The tendency of the day is to make land more and more an article of commerce; but it is some time before these ideas ripen, and meantime the generation of practitioners who entered the profession, and have all along practised it with different prospects, will have suffered without remedy from the great innovations which are proposed. We think, therefore, that if no compensation be given in the shape of a Parliamentary grant, at least some corresponding equivalent might be made by a small increase in the present rate of *ad valorem* fees. On the whole, it might, perhaps, be more advisable to concentrate the energies of the profession upon such a point as this, than to embark upon a doubtful, and what many deem:

hopeless struggle, to obtain Parliamentary compensation. But the subject is one not free from difficulty, and we are not surprised the different ideas abroad concerning it.

THE CONSTRUCTION OF WILLS.

THE MAGISTRATES OF DUNDEE v. MORRIS, ETC.

A decision of the House of Lords in the *Magistrates of Dundee v. Morris, etc.*, reversing a judgment of the Court of Session, as to whether certain writings left by a deceased were valid testamentary writings entitled to probate, is one of the greatest possible importance to the law of wills. Like the case of *Stein's creditors*, introducing the doctrine of stoppage *in transitu*, or *Fleming v. Orr*, as to the right to damages without *culpa* on the part of the defender, it may be viewed as forming an era in the department of our jurisprudence which it relates. The case is another example of the benefit the law of Scotland has derived from the constitution of the Court of Final Appeal—composed of judges familiar with the jurisprudence of the sister kingdom, removed beyond the influence of our provincial prejudices, and undisturbed by the perversions of *practice*. On former occasions they have brought back Scotch lawyers to a more accurate appreciation of legal principles, which, in process of time, and by a gradation almost imperceptible, had become in several cases obscured, and in others entirely lost sight of. The changes thus effected have been in some instances so violent, as to give occasion to the complaint that the House of Lords were forcing upon us a doctrine, borrowed from the laws of a foreign country, and alien to the spirit of our own. However this may be, there can be no question that, as regards the late appeal, the charge is totally without foundation. The House of Lords has done nothing but fix our law firmly on its true basis, and point out to us that it is much more liberal than the law of England on the subject of wills. "It would," said the Lord Chancellor, "certainly have been a subject of deep regret if there had been anything peculiar to the law of Scotland as compared with the law of England in reference to charitable bequests; but the (the Lord Chancellor) had been unable, after all the arguments at the bar, and the fullest examination of the authorities, to discover any great dissimilarity—of course always keeping in mind that the Mortmain Act did not extend to Scotland, and the difference which this circumstance must necessarily make in the decisions reported. On the contrary, there was reason to think that the law of Scotland was even more liberal than the law of England on that subject. Thus Lord Gifford was reported to have said, in an appeal from Scotland, that 'charitable bequests were more favourably con-

sidered in the law of Scotland than in the law of England.' Lord Lyndhurst had also made a similar observation in another case." It follows that the whole of the law of England has now, with respect to the nature and meaning of a will, been incorporated into the law of Scotland; and therefore it may not be uninteresting to inquire what is the current of the decisions on this subject.

When a writing is produced as a will, two questions arise,—first, whether it is a will at all,—whether the party whose deed it bears to be, died testate or intestate; and secondly, supposing the document is entitled to a character testamentary, what is its meaning?—what are the intentions of which it bears to be the expression? In England, the former question arises in the Court of Probate, where inquiry is made into what English lawyers call the *factum* of the will, *i.e.*, whether there is a deed in existence entitled to the name; the latter is reserved for the Courts of Equity, which apply their peculiar principles to the ascertainment of its true interpretation. In this country, no such proceeding is requisite to give validity to a will; but a debtor paying to a party unconfirmed, does so *suo periculo*. The only thing analogous to probate is confirmation, which is a judicial ratification or acknowledgment of the title of the party claiming under the will. In theory, it is the test of the executor's right to intromit with the deceased's moveable estate. The Commissary grants confirmation according to a certain order of preference. The person named by the deceased in his testament is the first taken; next, a universal legatory, though not named executor; after him, the next of kin; next, the widow; failing all these, creditors; and as the last resort, special legatees are preferred. Confirmation being a judicial proceeding, the deed giving the title should be looked at and considered; but in practice it bears a slight resemblance to the inquiries proper to a Court of Probate. Thus, in *Graham v. Bannerman*, 1822, 1 S. 362, an executor nominate was preferred to the nearest of kin, although it was alleged that the deed of nomination was under reduction. The executors named in the deed, it was held, are entitled to the office of executors until the deed is set aside. The Lord President said,—“An executor is a trustee accountable to those having right, and to the complainer, if it shall be found that she has the right. Until the deed of nomination be set aside, we cannot prefer any one to the executor nominate.” In a recent case, after the appointment of a party as executrix *dative*, another appeared and claimed confirmation, on the ground of being a degree nearer in propinquity. It was replied, that the first party held an assignation in her favour from the other claimant of his interest in the deceased's succession. Some discussion took place as to the validity of the assignation, and the Commissary preferred the nearer in degree, because, if the assignation was valid, it could be made effectual against the executor after he was decerned; for in that capacity he would be bound to administer the estate of all concerned.—a judgment which was obviously the common sense of the proceed-

ing. But the Second Division reversed, in order to secure what they called the "substantial justice of the case."—*Macpherson v. Macpherson*, 7th Feb. 1856, 18 D. 357.

But whether the case comes before the Supreme Court in an advocacy of the Commissary's judgment, or in the form of some independent proceeding, to ascertain whether the party died testate, and if so, the nature of his testament, the Court may be said to combine the functions of both a Court of Probate and Court of Construction, without being fettered with any of the English rules as to the principles which are peculiar to the province of the one, and those which can only be applied in the other.

To the English Court of Probate belongs the inquiry which may be necessary to establish the validity of the document, the signature, handwriting, attestation, etc. While a Court of Equity is restricted to the instrument itself in order to ascertain the intentions of the testator, the Court of Probate is not so limited; for there the question is, whether the intentions of the deceased, as these are to be collected from the whole circumstances of the writing together, shall operate, and compose his will. A Court of Probate is therefore in use to receive evidence, in order to clear up any ambiguity which appears on the face of the paper as to whether it was intended to be a will,—*e.g.*, whether a deletion was intentional, and falls to be governed by the ordinary presumption of law, or whether it was accidental, and there was evidence to rebut the presumption. In 1838, a statute of the Queen required every will to be signed by the testator in the presence of two witnesses. The statute of Frauds enacted, in effect, the same solemnities; but the courts, from a disposition to favour the last wishes of dying persons, in the course of time sanctioned a considerable departure from the plain and obvious meaning of the Legislature. Variations were permitted in the statutory requirement as to the signature: for the presence of the two witnesses they adopted what was called a "constructive presence;" *i.e.*, it was held to be a sufficient compliance with the statute, if the witnesses were within view, even though the testator in reality did not see them when he signed his name. Then an acknowledgment of the signature before witnesses was held to be sufficient, and the witnesses might make their attestation separately, and at different times. The Court would also grant probate of a will, even though imperfect; *i.e.*, with blanks, or otherwise incomplete,—or unexecuted, that is to say, not signed—provided the signature had been prevented by the act of God, and the testator had manifested no abandonment of the intentions contained in the instructions supplied to the solicitor. The only effect of the testator's subscription being absent, was to raise a presumption of law against it; but it was a presumption easily rebutted by evidence, showing that its non-execution was due to some sufficient cause other than an abandonment of the intentions therein contained. These and similar inquiries are proper to the Court of Probate, the functions of which are thus explained by Sir

John Nicholl, in 3 Phill. 478 :—" In the Court of Probate there must be some ambiguity, not upon the construction, but upon the *factum* of the instrument—not whether a particular clause will have a particular effect, but, whether the deceased meant that particular clause to be part of the instrument—whether the codicil was meant to republish a former or subsequent will—whether the residuary clause was fraudulently introduced without the knowledge of the testator (for fraud, of course, would go to the foundation of the will)—whether the residuary clause was accidentally omitted—whether an instrument be subscribed in order to authenticate it as memorandum for a future will, or to execute it as a final will. These are all questions of ambiguity upon the *factum* of the instrument, to be cleared up by evidence."

In this country the requisites of a valid deed, for whatever purpose, are prescribed by the statutes 1579, 1593, and 1681. A will may be in any form, conceived in any terms, executed at any time; but under these statutes it must be either holograph or tested. These are the only two conditions of its being probative, and their observance gives rise to a presumption in favour of genuineness. Where, therefore, a deed is vitiated by erasing certain words and superinducing others in their place, or by interlineations, such additions or alterations cannot bind the granter, because the presumption is, that they were made after the deed was executed, and when it was out of the hands of granter and witnesses (St. ii., t. 42, sec. 19; E. 3, 2, 20). Professor Menzies states the rule thus :—" It is quite certain that vitiation in an essential part of the deed will be fatal to the whole, unless it be separable as in settlements; where vitiation of one legacy, though annulling it, may leave the rest of the deed entire. What is an essential part depends, as remarked by Lord Stair, upon the nature of the suit. In a bond, the sum of money,—in a disposition, the name of the lands,—in all deeds, the name of the beneficial grantee,—and everything requisite to give effect to the statutory solemnities, etc.,—are all undoubtedly *inter essentialia*."

These principles have frequently been applied by the Court: in such cases, for example, as where half a line was so obliterated as to be illegible (Pitillo, M. 11536), or where the date of a *mortis causa* disposition was vitiated (Menz. M. App. writ. iii.; affd. W. S., 17th March 1806), or the word "witness" was written by another hand upon an erasure (Gibson, 1809, F. C. 321), or the word "three" in the year of the Christian era, was written upon an erasure in a sasine (Hoggan, 1 Rob. Ap. 321). In *Shepherd v. Grant*, 6 D. 464, a deed of entail was set aside in consequence of the designation of the first substitute being written throughout the deed on an erasure. The vitiation being in the essentials of the deed, its validity, it was said, was utterly destroyed, and no evidence was receivable to show that the defect was known to the maker, or was made with his concurrence. "To admit such evidence," said Lord

Wood, "would be contrary to the nature of a probative instrument,—the very admission of the necessity of such proof being also an admission of the invalidity of the instrument." The case was affirmed on appeal (6 Bell's App. 153). The general doctrine was repeated in *Ranken v. Reid*, 11 D. 543,—where a testator had executed a regular trust settlement, containing a direction to his trustees to apply the residue of his estate to such purposes as he should point out by any "deed, letter, or memorandum of instructions to be executed by me at any time of my life, or even on death-bed." These instructions were contained in a subsequent codicil, written *manu aliena*, and subscribed without being attested. This was held to be an invalid exercise of the power reserved in the trust disposition, and could not receive effect as a testamentary writing.

The strictness with which our courts have hitherto sought to secure the integrity of probative writings, must, since the late case in the House of Lords, suffer a considerable modification. The examples above given, it is proper to observe, chiefly related to heritages. Testaments, as being confined to moveable estate, have always been more favourably dealt with; but even as regards these, principles have now been sanctioned by the House of Lords, which will have a most liberalising effect on this branch of our law. It has always been the practice in wills to hold, that a vitiation, instead of making the whole deed good for nothing, only affects the part vitiated. "Unintelligible expressions in a testament," says Erskine, "are held *pro non scriptis*, and what remains plain has full effect; and in general, though the words should be ambiguous, or even improper, they ought to be interpreted according to the presumed will of the testator, if by any construction they can be brought to it" (E. 3, 9, 14). On these principles, the Court of Session supplied the words, "as much of," in order to give effect to the bequest of General Reid for the endowment of the Music Chair in the University of Edinburgh (*Mags. of Edin.*, 20th June 1851, 13 D. 1187). In a case which occurred in 1829, as to the effect of the word "pages" being written on an erasure in the testing clause, the law was thus laid down by Lord Alloway:—"Where there is no room to suspect fraud, all the effect which has been given by the Court to erasures, even where these may occur *in substantialibus*, is to hold *pro non scripto* what is written upon the erasure. If this has the effect to create a blank in one essential circumstance which there is no means of supplying from other parts of the deed, the effect may be to render it void; but if, on the contrary, the blank thus made shall either be of no material consequence, as creating no ambiguity, or may be supplied with absolute certainty from other parts of the instrument, which show that the word appearing on the register is the only one which could have been meant to stand there consistently with the meaning of the parties, and that the operation has been merely the correction of a clerical error, the instrument will remain effectual

notwithstanding." In other words, the presumption is, that the vitiation occurred after signature, and will invalidate the deed, if it is incapable of being understood without the words erased; but this is a presumption which may be rebutted, by evidence contained in the deed itself, or some relative one, tending to show that the defect was in the view of the testator at the time of execution. An example of this doctrine is the case of the Strathmore Trustees, in the House of Lords, 3d July 1840 (1 Rob. App. 189), where it was found competent to supply the defects of a deed relating to heritage, written in duplicate, by a comparison of the one duplicate with the other. There were erasures in both; but the words erased in one were unvitiated in the other; and the two copies of the one instrument were read together.

In regard to the form of a will, an important authority is *Stoddart v. Grant*, where the House of Lords (1 Macq. App. 163) (reversing a judgment of the Court of Session) found that seven separate documents, some of which were found in a band-box, and others in various drawers throughout the house of the testator, were entitled to probate as the will of the deceased; and Lord Chancellor Truro laid down the rule, "that instruments appearing *prima facie* to be testamentary, should be deemed testamentary until the contrary is shown. They were all to be read as one will. They may be altered; they may be partially revoked; they may be partially inconsistent with each other; and yet the latter of them may not operate as an entire revocation of the former." In *Macmillan*, 13 D. 187, a writing, bearing to be an agreement between the spouses, was, in respect of the evident intention of the parties, and of its being holograph of the husband, held to be intended as a settlement, and effect was given to it accordingly.

As to the construction of wills, the general rule is, that the Court will use every effort to arrive at the intention of the testator. For this purpose we are to look at the whole will, and more particularly the introductory words—the context, and the other devises in the will. Of two intentions, the chief one is to be carried into effect if both cannot; the intention to be followed is the one existing at the time the will was made, and the technical effect of words is presumed to be intended if a different intention does not appear on the will. (Ram. on Wills.) Every theory of construction is to be attempted in order to make the will sensible and intelligible;—intestacy is the very last theory to which a court of construction will be driven. As to the English rules of construction and their applicability to Scotch wills, see *Jack v. Burnett*, 5 Bell's Ap. 409.

In carrying out these principles, the court has to deal with uncertainties, arising from the subject of the bequest, or the object of the testator's bounty. Uncertainty in the first may arise from the gift being indefinite, as "some of my best linen, or a handsome gratuity, to each of my executors" (1 Jarm. 295); or of the "bulk" of certain property. These are obviously directions beyond

the power of any court of law to carry into effect. Thus, in the case of *Webb* (1 Roll, Ab. 609) a bequest to twenty of the poorest of kindred was held void for uncertainty. So also a handsome gratuity to the executors (*Jubber*, 9 Sim. 503). So also where a testatrix directed L.5 to be paid per annum to the inmates of the hospitals in and around Canterbury, whose yearly income did not exceed L.25. The bequest was held to be void principally because there was no sum specified, and it was impossible for the Court to direct how much should be set apart to answer the bequest (*Flint v. Warren*, 15 Sim. 626). But where the ambiguity or uncertainty arises from imperfect expression, the Court will, when the intention is plain and obvious, support the deed by supplementing the defect. In *Martins v. Gardner*, 1st June 1836, 8 Simons, 36, a legatee's name was expunged, but the legacy was nevertheless not held to be revoked, inasmuch as reference was afterwards made to it as "the said E. B." In another case a party left L.60,000; of this sum, he bequeathed to different persons L.51,000, and then proceeded to make a bequest of L.4000, "as the residue thereof," while in point of fact the residue was L.9000. It was alleged that the error arose from the unintentional omission of the name of a nephew, R. B., who was to receive L.5000; and evidence of this was tendered, consisting of an abstract of the contents of the will, in the testator's handwriting, in which the nephew's name was entered, "R. B., L.5000;" and also of a similar statement, in which the nephew was entered as liable in legacy duty on the above amount. The Court, looking to the internal evidence of the will itself, thought there was sufficient evidence of unintentional omission, and gave judgment for the legacy.—(*Bayldon*, 3 Add. 232.) But to support such a latitude of construction, the evidence must be clear and distinct. Thus, a bequest was conceived in these terms:—"Gives to Mr Robert Stone all such money as shall be due to the testator at the time of his decease;" and no other mention was made of the legatee, legacy, or any debt or debts with which Mr Stone had any connection. The attempt was made to make the bequest intelligible by adding the words, "from him," which it was averred were accidentally struck out. But Sir John Nichol refused to give effect to the suggestion without evidence on which the Court could rely; it could not be held, he said, that the words were struck through, on mere parole evidence, without anything in writing. While, therefore, the Court will, if possible, set up an imperfect deed, so as to carry out a testator's intentions, these must be manifest, either from the deed itself, or from other evidence worthy of implicit reliance. The Court will further remove any difficulty arising from an erroneous designation or misdescription, where the error is obvious. Thus, in the case of *Wedderspoon v. Thomson's Trustees*, 3 S. 279, a legacy bore to be given to "Janet Keeller or Williamson, confectioner in Dundee," which it was shown, by four wills and eight codicils (revoked), and other evidence, was intended for a person

named Agnes Keiller or Wedderspoon, and the Court sustained the claim accordingly. In another case arising out of the same succession (*Keiller v. Thomson's Trustees*, 4 S. 730), a legacy left to William Keiller, confectioner in Dundee, was claimed both by James Keiller, confectioner there, and William Keiller, confectioner in Montrose. The former was preferred. We may here mention a case, the authority of which is now considerably shaken,—*Ewan or Graham v. the Magistrates of Montrose* (17th Nov. 1830, 4 W. S. 346),—where the House of Lords reversed the judgment of the Court of Session, and declared the bequest void. The testator left L.6000 to trustees for building an hospital in Montrose, similar to Robert Gordon's in Aberdeen. He also directed the residue of his estate, after answering certain annuities, to be laid out, and allowed to accumulate until it should amount to the "sum of L. sterling," and then employed for erecting the foresaid hospital. Lord Wyndford held the difficulty created by the blank to be insuperable, as "no authority was given to any one to determine what is to be the amount of that sum which is to be realised before anything is done." On this case, the Lord Chancellor remarked in the late appeal, "There could be little doubt that a bequest of that kind in an English will would have been more favourably considered, and therefore their Lordships think that that case will be only an authority in any future case where the words are precisely the same."

In the case of the Morgan Succession, amounting to nearly L.100,000, the writings founded on were holograph of the deceased. They were covered with erasures and deletions, and were as follows (the deletions are printed in italics) :—

"Edinburgh, 10th October 1842.—I hereby annul all hitherto written on the first, second, and third pages of this, and wish to establish in the town of Dundee, in the shire of Forfar, an *hospital strictly in size, the management of the interior of said hospital in every way as Heriot's Hospital in Edinburgh is conducted.* The inhabitants born and educated in Dundee to have the preference of the towns of Forfar, Arbroath, and Montrose, but inhabitants of any other town are excluded.—JOHN MORGAN." "I hereby wish only one hundred boys to be admitted in the hospital at Dundee, *and the structure of the house to be less than that of Heriot's Hospital,* and to contain one hundred boys in place of one hundred and eighty boys.—Edinburgh, 20th October 1842.—JOHN MORGAN."

The next of kin contended that the writings relied on were not valid testamentary—if testamentary, they were void for uncertainty—if not void for uncertainty, they had been revoked or cancelled. The Lord Ordinary and the Judges of the Second Division unanimously held that the writings were mere jottings, and so obliterated and cancelled that it was impossible to make a will out of them, and therefore gave judgment for the defender, without considering the question whether the bequest was void for uncertainty.

In the course of the argument in the House of Lords, Lord Wensleydale, after consultation with the Lord Chancellor and Lord Cranworth, announced that counsel might assume in argument, as to the subject of the bequest, that the writings were testamentary, and

might be read as follows :—" I hereby wish to establish in the town of Dundee, in the shire of Forfar, an hospital ; the inhabitants born and educated in Dundee to have the preference of nomination over the towns of Forfar, Arbroath, and Montrose ; but inhabitants of any other county or town are to be excluded. I once intended the hospital to be strictly in size, the management of the interior of said hospital in every way as Heriot's hospital in Edinburgh is conducted ; but I have altered that intention, and I now wish only 100 boys to be admitted in the hospital at Dundee. I once intended the structure of the house to be less than that of Heriot's Hospital, but I now revoke that direction, and wish the hospital to contain 100 boys instead of 180 boys, the number which Heriot's Hospital contains." The principle on which the above paraphrase proceeds was thus stated by the Lord Chancellor :—

Now, it seemed to be conceded at the bar, that if the writings had remained in the first state, with no words deleted, they would have been good testamentary writings, and as such entitled to probate ; but it was said on the part of the respondents, that if the words deleted had been purposely deleted, the remainder was incapable of meaning, and that to restore words which had been deleted by the testator would be to go against his clear intention. Now, it was unnecessary to go into all the learning as to the effect of deletions and interlineations of a holograph writing, for it was admitted that if a holograph instrument was found bearing on its face any alterations which were *in substantialibus*, it was to be presumed these alterations had been made after signature, and would be fatal. But then there was an obvious distinction to be drawn between what had been altered in a deliberate way, showing a final intention, and what had been altered it may be accidentally, and without any intention. Now, on looking at this instrument, there were the strongest grounds for concluding that the deletion of the word "hospital" in the former of the two writings had been entirely accidental, and therefore that writing ought to be read as if the word was retained. But whatever opinion might be entertained as to that point, there was enough left in the instrument, which, taken in connection with the writing that followed, showed clearly enough what it was that the testator wished to establish in the town of Dundee. It was clearly enough to be gathered from the two writings taken together that the testator wished to establish an hospital at Dundee capable of containing 100 boys—the inhabitants born and educated in Dundee to have the preference over the towns of Forfar, Arbroath, and Montrose. The writings being therefore testamentary in their nature, and such being the form and nature of the bequest, the only remaining question for their Lordships to consider was, whether, according to the law of Scotland with regard to charities, there was anything in the form of this legacy which rendered it void by reason of uncertainty.

The following remarks fell from their lordships on the branch of the case which was not decided in the Court below—the question of uncertainty :—

The LORD CHANCELLOR.—Adopting the benignant construction that is shown to prevail in Scotland as to charitable bequests, was there in the present case an intention sufficiently certain shown by the testator as to the subject and the objects of his bounty, so as to warrant a court in carrying that intention into effect ? Now, in the first place, there can be no doubt that the general intention to establish an hospital at Dundee for 100 boys is clearly indicated. In the law of Scotland the term "hospital" was very well understood to signify a place for the education of children. So far, therefore, there was no uncertainty. But it was said that all that was shown

on the part of the testator was a mere wish—that he may have had a vague and indefinite design of some day establishing an hospital, but that that design was uncertain, and at best but a mere floating desire. But it was not necessary to go into the authorities to show that the mere expression of the wish of a testator, if clear, was quite sufficient, and amounted to a valid bequest. What then was the wish? It was to establish an hospital. That must be taken to mean that he wished a building to be provided capable of accommodating the number of children he specifies, and that was sufficiently definite for a court to know how to act upon it. But it was said that there was nothing to show what class of boys were to be selected; and if there was, then it did not show whether they were to be boarded and lodged also. Now, the boys were sufficiently defined when they were said to be the sons of inhabitants “born and educated in Dundee or Arbroath, Forfar, and Montrose.” The parents must have been born in those towns, but may reside in any other place. That was definite enough. Nor could there be any doubt of the intention to maintain as well as to educate these boys; for, of course, since many of the boys must come from Forfar, Arbroath, and Montrose, it was impossible these could have the benefit of the institution unless they were also lodged, and boarded, and clothed. There might be some doubt as to their being clothed; but even if this latter point were left uncertain, it would not be sufficient to defeat the main object of the testator, which had been otherwise clearly expressed. Then it was strongly urged at the bar that the testator had not specified what portion of his means he intended to devote to the establishment of this hospital; and it was said that it would be impossible to fix upon the size and style of building that ought to be erected. Now, there had been many cases of this kind in England, and it had been clearly settled that if there were any data or fixed points from which to start, one could always arrive at a proper conclusion as to what portion of the residue would be necessary. If we have the spot fixed, where the building is to be, and the extent which must be taken to be enough to accommodate 100 boys, the main data are at hand. The intention of the testator was either to give the whole of the residue of his property to this charitable purpose, or as much as would suffice. The tenor of the writings left by the testator showed his intention rather to be to give the whole residue; but at all events no difficulty could exist in the way of preparing a scheme satisfactory to the Court for the purpose of carrying out the bequest. Those details were for the Court of Session to consider hereafter. At present it was enough to say that the decision of the Court below must be reversed, and the cause remitted, with a declaration to carry out the testator’s object by ordering a scheme for an hospital capable of accommodating 100 boys to be prepared.

Lord CRANWORTH said that the learned judges in the Court below had proceeded on the ground that these instruments were so very loose and uncertain that they could not be taken as amounting to anything like a will or deed expressing the ultimate and final intention of the testator. The Lord Justice-Clerk, for instance, had said, “I confess my notion of the whole case is, that these papers must be taken as mere scrolls or jottings, from which the deceased intended at some time or another to have a settlement made up; but I think there is no valid or effectual writing that the Court can recognise. If they did, it would be the strangest case of making a will that was ever attempted.” So Lord Murray thought the writings nothing more than “a variety of jottings, showing that various ideas had been passing through Mr Morgan’s head about an hospital,” etc. Now, he took it that this case presented the same question in Scotland as would have been presented to an English court twenty years ago, before the Wills Act had passed. Looking, therefore, to all these writings, their Lordships were called on to say whether the testator intended them to be operative unless he altered them by some other instrument. Now that they were intended to be final in this sense, seemed to be clear to demonstration. The language is clear and precise—“I hereby annul all written on,” etc., etc. as that a final expression of intention, or a mere memorandum for a future

expression? He thought it beyond all doubt, from the way these writings were left, that they were not mere jottings, but were final and deliberate in their character. His scratching out the part that was rendered useless by his sister's death, his putting his initials on the margin of interlineations, and other circumstances, all showed that the testator regarded them as final. Now, the argument against the validity of the former writing was, that the word "hospital" had been struck out, and therefore nobody could tell what it was that the testator wanted to establish at Dundee. There was no doubt that the word "hospital" had once been there; and even though it was not competent to look at the erased words (which, however, he did not admit), still there was enough in the second writing to show that the word hospital must be the word to be supplied in the first writing. Therefore there was a valid expression of an intention to establish an hospital at Dundee for 100 boys. It was the mere wish of the testator, no doubt; but that was equivalent to a direction to pay a bequest out of his estate for the purpose stated. Then an hospital plainly meant a place where boys were to be instructed, and, moreover, where they were to be lodged, they were to come from Arbroath, Forfar, and Montrose. It is plain the boys did not come day by day from those places, and therefore they must be lodged and maintained in the building. Then, was this a sufficiently definite section? The place was defined; it was Dundee. The object was defined; it was to educate and maintain boys. The class of persons was defined; it is that class of boys whose parents would reasonably be expected to seek a gratuitous education for their children. That being so, the will is to establish an hospital, *i.e.*, not merely to build a house, but to supply masters for the purpose of giving the education. Therefore the object was clearly enough defined; and though a sum is not mentioned for the purpose of carrying out the will, still the Court must find out what such a building and institution would cost. Whenever that is ascertained, then that is the sum the testator intended to give. That sum will exhaust the whole funds, then the whole funds were given. If the will not exhaust the whole, then the surplus is undisposed of, and will go to the next of kin. The interlocutor of the Court of Session is therefore wrong, and must be reversed; and the case must be remitted, with a declaration that the will was valid.

LORD WENSLEYDALE.—This appeal had been very ably argued, and the first question was, whether these were valid testamentary writings entitled to probate? The Court of Session had thought they were jottings or scrolls, but in its opinion they clearly contained the expression of a final purpose. The respondents, however, say that the bequest is so uncertain, that no court can give effect to it, because it does not state who are to be the objects of bounty, and how much is to be spent in carrying out the bequest. The appellant replies that there is no uncertainty, because the testator intended either to give the whole of his estate, or so much as will suffice to establish the hospital. He thought there could be little doubt the *whole* of the estate was intended to be given, because the testator revoked all previous bequests, and directed such an hospital to be erected as would require the whole of that estate as nearly as possible. Even if there were no words sufficient to carry the whole estate, still it was sufficiently implied that as much was given as would be necessary to enable a court to direct a scheme and carry out the bequest. He confessed he had doubts as to the right construction. All depended on the words not deleted, for whatever was purposely deleted could have no effect. The judges of the Court below thought that the deletion of the word "hospital" in the first writing made it quite uncertain; but there were many circumstances to show that the deletion of that word was accidental. If not accidental, why did the testator leave the other words? But be that as it may, still the defect was supplied by the second writing; and, reading both together, it was clear that what the testator wanted to be built was an hospital at Dundee for 100 boys—the boys of that town to be preferred over those of Montrose, Arbroath, and Forfar. The word hospital was defined in English dictionaries to be a building for the sick poor; but in Scotland it seemed to be also an educational institution. It

was clear that it was not meant for sick persons, for the testator did not mention the word "sick." If boys were to be received, then, they were to be instructed; and if they came, as they might do, from a distance, it followed that they must be provided with necessaries and clothing. It was doubtful whether the deleted words could be looked to in order to give further effect to the undeleted words; but he thought they might be looked to in order to see what the testator meant at the time he first wrote the instrument. It therefore sufficiently appeared in that way that the testator knew what sort of hospital Heriot's Hospital was, and that he once intended to make a similar one, which was, however, afterwards reduced to one containing 100 boys. The true question, however, was, what was the meaning of the undeleted words—did they show a bequest void for uncertainty? He believed the law of Scotland did not differ from the law of England as to bequests being void for uncertainty. When a will stated the object of the testator, but was indefinite as to the sum of money bequeathed, and furnished no means of ascertaining the amount, it was held void for certainty. Thus, if a testator bequeathed to a person the "best of his linen," or "some of his best linen," that has been held void for uncertainty. But where the testator bequeathed "such linen as the executor should choose to give," that would be a good legacy, for it furnished a mode of ascertaining a definite quantity. So where a testator bequeathed "a reasonable sum of money to a person for the trouble that person had taken," the Court has referred it to the Master of the Court to ascertain a fair sum. So where a testator bequeathed a sufficient sum to a person to take care of his daughter, the Court has directed such a provision to be settled on the daughter as the Master should direct. So when an executor was directed to put a child to a respectable profession or employment, the Court has directed its officer to fix a sum. Upon the whole, looking at this will, he thought there were sufficient means of ascertaining the amount of the sum bequeathed. It was such a sum as would establish an hospital for the maintenance and education of 100 boys at Dundee during the period boys were usually kept at school. It will be for the Court of Session to take the proper means for ascertaining that sum, and if the whole estate is not required, that the surplus will be undisposed of.

Review.

The Government Law Bills.—The country and the House of Commons having consented to the continuance of Lord Derby in power, his administration will, doubtless, be of peculiar interest to lawyers. The Government is unusually strong in legal talent; law reform is a question unaffected by the traditions of party; and it is therefore reasonable to suppose, that a series of law bills will form a large proportion of those "good measures" of which such ample promise has been made. The Attorney-General (than whom there is no abler or honester lawyer in the House of Commons) has given notice that, on the 3d June, he will introduce seven bills for the consolidation of the criminal law. These will be referred to a select committee to report upon the expediency and practicability of consolidating the statute law, and also on the expediency of the appointment of a board for the revision of all bills brought before the House. On the same day he will introduce a Bill to amend the law relating to the wills of British

subjects residing abroad, and to the granting administrations to the estates of such persons; also a Bill to enable persons to establish their legitimacy before a court of law; and also to enable persons in like manner to establish their right to be regarded as natural-born subjects of Great Britain, and to extend the jurisdiction of the Divorce Court. The Lord Advocate's Titles to Land Bill has not yet been printed. The second reading is fixed for so early a day as the 7th June; but we hope Parliament will not pass it into law, without affording time for a full expression of the professional opinion on the very important changes which, it is understood, will be proposed. Meantime, we may notice,

The Executors Bill.—The Lord Advocate has here provided a simple remedy for an evil which has long been a favourite grievance. The principle of the bill has become a recognised necessity of the times. It is a branch of that general legislation with respect to the validity of judicial proceedings in England, Scotland, and Ireland, beyond the jurisdiction of their respective courts, which is a natural consequence of those intimate relations now subsisting between the three kingdoms. However long they may retain their different systems of law, and separate and independent judges, there can be no question that the means of rapid and frequent intercourse, and the extensive distribution of capital, have, for all the purposes of execution, made them one State. There are few men of property whose money is not invested in each of the three kingdoms, in land, in stock, or in some other form. It was, therefore, a peculiar hardship to be compelled to repeat a purely formal proceeding three times, in each of the three kingdoms, before an executor was entitled to intromit with a deceased's estate. The Lord Advocate proposes that there should be only one judicial ratification of an executor's title; that it should take place in the Court of the domicile; and that on presentation it should be sealed, as a matter of course, by the English and Irish Courts of Probate. At the same time, advantage has been taken of the opportunity to reform and simplify the old ecclesiastical formalities peculiar to the Commissary Court. Edicts of executry are at an end, and publication of them at the kirk-door and market-cross will follow the fate of proclamations at the "pier and shore of Leith." Confirmation of executors nominate will remain on its existing footing; in other cases, the first proceeding is by petition to the Commissary. The procedure which will ensue is as follows:—The petition is affixed to the door of the Court-House. The Clerk sends a copy to the Keeper of the Record of Edictal Citations, who makes an abstract in a tabulated form, and publishes it weekly, along with the abstracts of petitions for general and special service. The publication is transmitted by the Keeper to the Clerk, who certifies on the back of the petition that the same has been printed and published. Nine

days thereafter, the petition is called in Court, and an executor de-cerned, or other proceeding may take place, according to the forms now in use. A decree dative may be extracted not sooner than three lawful days after it has been pronounced. In giving in the inventory, it will no longer be necessary to specify each article; but the general nature and value of the property may be exhibited under different heads—thus, “cash in house,” “furniture, linen, plate, pictures, jewels,” etc., so much. The inventory given up in Scotland, may include personal estate in England and Ireland. There must be a separate statement for each country, but one stamp will cover the entire value. When this is the case, a Scotch confirmation may be produced in the principal Court of Probate in England or Ireland, with a certified copy of the interlocutor finding the party died domiciled in Scotland (“which shall be conclusive evidence of the fact of domicile”); “and such confirmation shall be sealed with the seal of the said Court, and returned to the party producing the same, and shall thereafter have like force and effect in England as if probate or letters of administration, as the case may be, had been granted by the said Court of Probate.” Conversely, when the deceased dies domiciled in England or Ireland, probate or administration granted there is, when produced in the Commissary Court and indorsed by the Clerk, to have the effect of confirmation.

Bank Cheques.—The new Act imposing a penny stamp duty upon cheques has suggested the expediency of amending the laws relating to cheques and remittances. The bulk of pecuniary settlements between parties at a distance were effected, prior to the changes introduced by Mr Gladstone’s budget, by the use of letters of credit. But, since the reduction of the stamp duty on drafts payable on demand to a uniform rate, a very large proportion of ordinary remittances have been made in the form of drafts. Two very important declaratory provisions have been added, in consequence of these changes, to our mercantile code; and the legal interpretation of these clauses has now been authoritatively determined by the Court of Exchequer Chamber, on appeal from the Queen’s Bench, in the case of *Simmons v. Taylor*. The Stamp Act of 1853 exempted bankers from liability for the consequences of making payment to the wrong person on the faith of a forged indorsement,—thus putting it in the power of any person who might fraudulently acquire such a draft to obtain payment from the bank drawn upon, without any risk attaching to the banking company for their negligence. To obviate this inconvenient result, Mr Apsley Pellatt’s Act was passed to legalise the “crossing” of cheques. This Act (19 and 20 Vict., c. 25) declares, that where any draft or order payable on demand shall bear on its face the name of a banking company, or the words “and company,” in full or abridged, such draft shall only be payable to, or through, some banker or banking company. The

Courts of Westminster Hall have, however, decided that the protection afforded by this Act may be destroyed by the simple expedient of erasing the cross-written words,—one learned judge going so far as to say that the holder of such a note had as good a right to erase the crossing as the drawer had to add it. It does not seem to have occurred to this profound jurist that the person who would erase the crossing was not the lawful holder, for whose protection the cross-writing was added, but a *thief*, who would be unable otherwise to get the order cashed. No person receiving a crossed cheque in a legitimate way could have any motive for obliterating the direction; and the real question simply is, whether the erasure of the cross-writing is to have the same effect as an erasure in the body of the draft, that is, to raise a presumption of forgery or fraud, and to subject the banker who pays the vitiated order to civil liability for his negligence. The English common law judges have held that bankers are at liberty to disregard the erasure; but the common sense of mercantile men has led to an opposite conclusion. As a general rule, we think it is inexpedient to interfere with the decisions of the legal tribunals by declaratory legislation; but the decision in *Simmons v. Taylor* has substantially repealed Mr Pellatt's act, and a more stringent enactment will be absolutely necessary to protect the public against a system which confers a premium on negligence and virtual immunity for fraud.

Fee Fund Dues.—A question of considerable importance to practitioners was decided a few days ago by the Court, with reference to the payment of fee fund dues upon an adjusted paper. In a case depending before Lord Ardmillan, certain alterations had been made in the course of adjustment upon the revised defences. The clerk required the agents to fee fund the paper of new, in consequence of these alterations, which the agents refused to do, on the ground that the collector of fee fund had no authority to make any such charge. The process was then arrested by the collector, who appeared for his interest. The point was reported by Lord Ardmillan to the First Division, both parties agreeing that the general question was to be discussed irrespective of the large or small amount of alteration on the particular paper. The clause in the statutory schedule relied on by the collector was, "condescendence and answers, revised or amended condescendence and revised or amended answers, with or without note of pleas in law annexed, each 5s." The Court, however, unanimously held that there was no authority for the proposed charge. The adjustment was supposed to be made at chambers, in presence of the Lord Ordinary; and this new practice was introduced, among other things, for the very purpose of saving to litigants the expense of the re-revised and adjusted separate papers formerly necessary. The contention on the part of the collector just amounted to this, that, if a word were deleted, or a word added at adjustment, a sum of 5s. would require to be paid

for fee fund—a proposition manifestly absurd. So far the decision of the Court was unexceptionable; but, with what we must consider a strange inconsistency, they refused expenses to the party who had been obliged to defend himself against an unjust exaction, and whom the collector of fee fund had asked to go with him to the Court to get the practice settled. Rather than have had the trouble and expense of appearing in the Inner House, the party would, of course, have paid the small charge; but he is now mulcted in his own expenses for having settled this rather important point of practice! It was stated that the collector invariably made the charge where the clerks reported to him the adjustment of a paper, and yet, with the Crown so far *lucratus* by the former improper practice, the Court refused expenses to the party challenging. The expense would have been a perfect trifle to the Treasury, but is a most serious hardship to the individual litigant; and we think the Queen's Remembrancer might, with a good grace, still recommend that the Crown should bear the cost of the discussion.

The Morgan Succession.—The decision by the House of Lords in the appeal at the instance of the Magistrates, etc., of Dundee v. the Reps. of the late John Morgan, as to the testamentary writings left by that gentleman, has been variously viewed. A more complete reversal of the decision of a Scotch tribunal has not occurred; but it appears to us, that the decision is only the natural sequence of the cases of *Jack v. Burnett* (28th August 1846, 5 Bell's Appeal Cases, 409), and *Stoddart v. Grant* (28th June 1832, 1 Macq. 163). The appeal lay against a judgment of Lord Handyside, affirmed by the Second Division unanimously, without hearing senior counsel for the defenders, which denied effect to the bequest which it was sought to render effectual, because the writings alleged to contain it, although admitted to be holograph, were not to be considered testamentary, and even were they to be so regarded, they were to be held as revoked by the deletions which appeared on the face of them. The House of Lords have found that Mr Morgan did die testate, and that where there is evidence *in gremio* of the documents constituting a will to show a deletion to have been the result of accident, the Court must reinstate the deleted word. Having thus supported the deeds, the House of Lords went on to find that the bequest was not void from uncertainty, and they threw grave doubts upon the authority of *Ewen or Graham v. the Magistrates of Montrose* (16th Nov. 1830, 2 Dow and Clarke, 74). In this way the town of Dundee will now succeed to Mr Morgan's fortune, understood to be above L.100,000; and the Court of Session have had the case remitted to them, to prepare a scheme for an hospital in that town to accommodate 100 boys. The case is one of considerable hardship to the parties, who, after an expensive and protracted litigation, had succeeded in being declared Mr Morgan's nearest relatives, and were prepared to ignore the will; but there will remain for them the

eritage which he has left. The litigation assumed at first the form of a multiplepinding; and in that process, after the issue of the trial to who the nearest relatives were, the Town and Trades of Dundee tempted unsuccessfully to appear (11th March 1856, 18 D. 797). They betook themselves thereafter to an action of declarator, and they succeeded in establishing its competency, and their right to assist in it, without reducing the decree of preference which the relatives had obtained, and without being obliged to pay the expenses incurred by the defenders in the multiplepinding (14th Dec. 56, 19 D. 168). It is in this action that the Town and Trades of Dundee have now finally succeeded; and what the House of Lords have by a liberal interpretation read as Mr Morgan's intentions regarding an hospital, will thus receive effect. The equity of the decision is undoubted. It is only matter of surprise that our courts should have so long considered themselves bound to exercise their jurisdiction in will cases as mere courts of law. The principles, however, on which they ought to proceed, have now been authoritatively enunciated; and the valuable stores of precedent to be found in the decisions of the Equity and Ecclesiastical Courts of England, will be available as guides to their right application. This result cannot be viewed with alarm by those who, with ourselves, desire a gradual, instead of a hurried and inconsiderate assimilation of the laws of the two countries.

The Rights of Juries.—It is a great mistake to suppose that in criminal cases there exists in this country anything equivalent to the power of an English judge to withdraw the case from the jury. On the contrary, a Scotch judge has no power to nonsuit the Crown. The jury are bound to receive the judge's directions on matters of law,—e.g., that no conviction could follow, if the prosecutor closed his case after calling only one witness, however unworthy. But in all questions relating to the sufficiency of the evidence, the jury, as the appointed investigators of fact, are the masters and monarchs of the case—quite at liberty to disregard the judge's opinion thereon; and their verdict, if in form and applicable to the issue remitted to them to try, must be recorded, however perverse or absurd. The only person who can constitutionally interfere between them and the prisoner, after he is in their hands, is the public prosecutor, who, like any other pursuer, is always at liberty to abandon his case. On this ground the House of Commons in 1844, by a large majority, refused a motion for a royal commission to inquire into the conduct of the judges who presided at the Glasgow Assizes immediately preceding. The charge was assault with intent. The judges thought the evidence insufficient, and suggested that the case should be given up by the Crown. The jury were of a different opinion, and insisted on their right to find the man guilty. The Advocate-Depute ultimately withdrew the charge, and a verdict of not guilty was entered. Thereupon ten of the

jury protested, and had the case brought before Parliament; but here manifestly there was no ground whatever for interference, because the Advocate-Depute having withdrawn the charge, the verdict recorded was the only one which could competently be returned.

At the last Glasgow Assizes another case occurred, which has excited much attention.

Three men, named M'Cartney, M'Crone, and Hughes, and a woman, named Farrel, were placed at the bar, charged with garrotting Thomas Newstead, a clerk, at an urinal in Gallowgate, and robbing him of a silver watch, on 12th December last. The case went to trial against all the prisoners, who were defended by separate counsel. The evidence showed that three men and a woman had been seen at the spot where the robbery (as to which there was no question) had been committed, that two of the men entered the urinal, following Newstead, and that the third man and the woman remained outside. Mr Newstead was violently seized and robbed of his watch by two persons, whom he identified as M'Crone and Hughes. The watch was given to the woman when the men came out, and the three immediately ran off, but the third man stood still. This man, according to the theory of the Crown, was the prisoner M'Cartney; but the evidence was rather contradictory as to his identification.

When the case was closed, and counsel rose to speak for M'Cartney, he was stopped by the Lord Justice-Clerk, who asked the Advocate-Depute if he considered there was evidence to go to the jury against that panel, as he did not think there was. The Advocate-Depute said nothing, and counsel resumed his seat. The jury were then addressed on behalf of the other prisoners, were charged by the judge, who made no reference to M'Cartney's case, and retired to consider their verdict. On their return, the chancellor had got the length of saying—"We find, by a majority, the prisoner M'Cartney guilty as libelled, and the others," when he was interrupted by the Lord Justice-Clerk, who said he could not receive any such verdict, as he understood the jury had agreed with him in the opinion, that the charge had not been proved against M'Cartney, whose counsel on that account had not addressed them, and that before they could return a verdict against him, they must hear his counsel. Counsel was sent for, but he had left the Court. The jury again retired to reconsider their verdict. However, they remained of the same opinion. In this unexampled dilemma, the Lord Justice-Clerk, after consulting with Lord Ivory, remarked, that the question was of such importance, that he had no alternative but to order the jury to be enclosed for the night, in order that they might be addressed by M'Cartney's counsel next day. Next morning, accordingly, the unspoken speech was delivered—the judge explained, in a second and very luminous charge, how they were all wrong, and must acquit the prisoner,—the courage of the

stinate jurors gave way,—three went over from the side of the 1 who were for convicting to the five who were for acquitting; d thus, by a majority of one, a verdict was returned in harmony th the wishes of the Court, and in accordance with the approved axim, that it is better that ten guilty men should escape than one nocent be punished.

Now there is something very curious and anomalous in the whole this proceeding. We are not aware of any previous instance in a history of criminal law, where a reclaiming petition, or more operly, perhaps, a representation to a jury against their own ver-t, was allowed; for the speech the morning after they had made up ar minds, and were, in point of law, done with the case, was ither more nor less. It is a proceeding to be chiefly condemned account of the hardship it inflicted on the jury. The night's nfinement was a small matter compared with being placed in the asing predicament of either sacrificing their own opinions, or ultifying themselves by reversing their former decision.

Altogether the "boasted institution" does not appear to advan-ge in the case. At the same time, although no judge is entitled refuse a verdict, when tendered in a formal and regular manner, ere is this to be said for the Lord Justice-Clerk, that, but for the urse he took, M'Cartney would have been at this moment under-ing a long term of penal servitude. The inconvenience which e jury suffered by one night's confinement is slight indeed, com-red to the consequences which their first verdict must have car-d against the prisoner unjustly; for, being acquitted, we must esume that he was innocent. The whole of the difficulty ight have been avoided if the counsel had insisted on the verdict ng recorded when it was tendered. It was their right to do so; d how they failed to see that it was also for their interest, we are a loss to comprehend. They ran no risk, because they could t make their case worse if the jury were for convicting. On the her hand, there was a chance,—a very considerable chance, we ink, with such a jury,—of their verdict being one of acquittal gainst one or more of the prisoners.

Appointments.—The new Government have been unusually for-unate in their first piece of judicial patronage. Mr Penney was, t the beginning of the present term, elevated to the bench under he title of Lord Kinloch, with the unanimous approval of all sections of the profession. As a Lord Ordinary, his Lordship is giving great atisfaction, and he promises to be a valuable accession to the re-markable combination of varied talent which now adorns the Scotch Bench. His appointment relieves Lord Mackenzie of the many arduous duties which he has so long and satisfactorily discharged as Junior Judge.—Mr Russell, one of the Principal Clerks of Session, after 43 years' service—during which long period he has won the respect of all with whom he was brought in contact, is about to retire

on an allowance of two-thirds of his salary. Rumour assigns the post to Mr Inglis, the present Crown Agent.

The Queen has conferred the honour of knighthood upon Adam Bittleston, Esq., Judge of the Supreme Court of Judicature at Madras.

Alexander James Johnston, Esq., of the Middle Temple, Barrister-at-Law, has been appointed Puisne Judge of New Zealand. Mr Johnston is a member of the Northern Circuit, and has been for some years one of the reporters in the Court of Common Pleas for the *Law Journal*.

A member of the English bar has been appointed Attorney-General of the Island of Ceylon—a colony which ought in fairness to be supplied with functionaries from Scotland, as the civil law which was introduced by its Dutch founders is still administered. We believe that that principle would have been given effect to if the late Government had for a few weeks longer remained in power.

Practice as to Productions.—The *mala praxis* which has arisen as to reserving leave to put in productions after the record is closed, has at length been stopped by the Outer House Judges. The directions of the statute will in future be enforced. It is no longer competent to produce a document after the record is closed without an express minute of consent.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

JOHN LAMONT v. JAMES SMITH.—May 13.

Writer's Hypothec—Transaction.

Herbertson purchased from Lyle, in 1849, certain steadings of ground for building purposes, the price to be converted into a ground-annual. Lamont acted as Herbertson's agent. Herbertson did not proceed to build till May 1854. By that time Lyle had agreed to convey the right to the ground-annual to Bell of Abbotsburgh. It was therefore arranged, in order to save the expense of several deeds, that Lyle, the seller, should convey the subjects to Herbertson, the purchaser, under burden of the ground-annual, in favour of Bell. A deed embodying this arrangement, was accordingly prepared. It contained an obligation on Herbertson and Lyle, to put the deed on record, and furnish an extract to Bell. In this transaction Lamont again acted as agent for Herbertson. Smith acted for Lyle and Bell. After the deed was executed, Smith sent it to Lamont, with a request to be furnished with an extract as provided for—which Lamont promised to do "so soon as I have exhibited the contract of ground-annual to superior's agent." Thereafter Herbertson, the purchaser, was sequestrated. The deed had not then been recorded. Smith then applied to Lamont to record it, or return it, in order to get it done. Lamont refused, on the

round that he had an hypothec or lien over it for an account due to him by Herbertson. Smith applied for judicial authority to compel Lamont to record the deed or return it. He pleaded, that the deed was sent to Lamont for a special purpose, and so could not be retained by him for Herbertson's account against Bell or his agent, for there were here two distinct estates, one of which belonged to Bell, and of which this deed was the sole title.—*Skinner*, 31st May 1823. *Pleaded* for Lamont: A writer's account is preferable to an heritable debt, and a ground-annual is on the same footing.—*Campbell*, 1st Feb. 1857; *rovenhall's Crs.*, Dict. 6253; *Campbell v. Clason*, 15th Nov. 1822. *Held*, that amount could not retain the deed. Herbertson was not the sole owner of the deed, and Bell was not a mere creditor or encumbrancer. It was a mutual contract, constituting an entirely separate estate in each party, and whether amount was bound to put the deed on record or not, he was not entitled to lead his hypothec, so as to prevent its being recorded.

ROWLEY v. COLLINS AND SONS.—*May 14.*

Contract—Sale—Liability.

In February 1847, Rowley bought from Collins and Sons fifty tons of bar-wood, to be delivered ground as he should require it. The price was L.5, 15s. per ton, and the cost of grinding L.2 per ton. Thirty-five tons were delivered, as required, between that date and 1852, and the whole price was paid. In June 1852, Rowley requested Collins and Sons to send the remaining fifteen tons to Paynter, to be ground by him. They did so, and the cost was L.30. This sum Rowley now sought to recover from Collins and Sons, on the ground that, by their contract, they were bound to deliver the wood ground, that he had paid them for grinding the whole of it, and that it was with their consent that it had been sent to Paynter to grind it. *Pleaded* for Collins and Sons—They never authorised the wood to be ground at their expense. They were perfectly able to do it themselves, and had plenty of ground bar-wood in store to meet the pursuer's orders. After proof: *Held*, that there had been no transaction between the parties, by which, in consenting to send the wood to Paynter to be ground, Collins and Sons agreed to return any part of the price; and, although it was alleged by Rowley that his customers complained of the way in which Collins and Sons were grinding the wood, it was not proved that these complaints had been communicated to them. Therefore, although in telling Collins and Sons to send the fifteen tons to Paynter, Rowley possibly meant to hint to them that he was dissatisfied with their work, he had not discharged himself of the burden of himself paying the cost of grinding by Paynter.

FORD v. MUIRHEAD.—*May 19.*

Process—Issues—Malice, and want of Probable Cause.

In an action of damages, on a *meditationes fugas* warrant, which was obtained on the dependence of an action at the instance of the defender against the pursuer—*Held*, that it was not necessary to take an issue of "malice and want of probable cause," but that it was sufficient, if the act complained of was characterised as done "wrongfully." Issues were less extended in their expression than they used to be—certain words being now used and inserted in issues having certain legal effects and meaning, and the word "wrongful" would meet the justice of this case, meaning thereby a legal wrong, such as the violation of this party's rights, through the use of diligence, or obtaining it by a reckless allegation on oath, that the debtor meant to fly when the creditor had no reasonable ground for supposing that he was about to do so. The word "wrongful," was intended to leave to the judge in each case to point out to the jury the true issue of the case, as to the conduct of the creditor, and how far he had exceeded legal bounds.

HOGARTH v. ROSS.—May 21.

Process—Fee-Fund Dues—Adjustment Roll.

This process appeared in the Lord Ordinary's adjustment roll, and was adjourned; and thereupon the pursuer borrowed the process, and made some alterations and additions on his revised condescendence. *Held*, that such alterations at adjustment did not make the paper on which they were made an amended paper, in the sense of the statute (2 and 3 Vict., c. 36, sec. 2), and consequently, that fee-fund dues were not exigible, but *observed*, that if alterations at adjustment be such, that they ought properly to be made only under the authority of a special interlocutor, that the fee-fund might be exigible.

PEARSON OR BELL v. MILLER.—May 22.

Suspension—Bill—Juratory Caution.

A promissory-note was granted in November 1857 to Miller, by Mrs Pearson or Bell. Being charged on it, she suspended, on the ground that she was a married woman. This was disputed by Miller, who pleaded, that as she carried on business as an unmarried woman, and the debt was incurred by her in that character, the suspension should be refused—at all events, that the note should be passed only on full caution. *Held*, that the suspender was entitled to have the note passed on juratory caution. The bill was signed by her as a married woman, and *prima facie* evidence of her marriage was instructed.

LAMONT v. BAKER.—May 22.

Forbes Mackenzie Act—Suspension of Conviction.

Suspension of a conviction and sentence for selling exciseable liquors without a certificate. The conviction found the complainer liable in a penalty of L.15, and adjudged him to pay the penalty to the respondent, "to be applied as the magistrates shall direct, in terms of law." Pleaded for the suspender: The application of the penalty is discretionary, and it was indispensable that the conviction should specify the particular way in which it was to be applied (Paley on Convictions, p. 233). *Held*, that the question being important as a precedent, the note should be passed to try the question, but opinions reserved.

SECOND DIVISION.

UDNY v. UDNYS.—March 16.

Entail—Fetters—Irritant Clause.

The prohibitory clause of the entail of the estate of Dudwick, prohibited the maker and heirs of tailzie from—(1), Altering or infringing the tailzie; (2), Selling, disposing, and granting long leases; (3), Contracting debts, and (following that prohibition); (4), "Doing any other deed or deeds, whereby the same might be comprised, adjudged, evicted," etc. The irritant clause was in these terms:—"And if it shall happen me, or my said heirs of tailzie, to failzie and doe in the contrair, then and in that case all and every such debts and deeds to be done by me or them, contrary hereunto, shall not only be null and of no avail," etc., "in so far as the same can affect or burden the foressaid lands," etc., "but also," etc. *Held*, adhering to the judgment of Lord Handyside (Ordinary), that the irritant clause only referred to the prohibition against the contraction of debt, and that the entail was defective.

Authorities for Pursuer.—Hay v. Hay, 20th December 1842, v. D., p. 347; Lang v. Lang, 23d November 1838; i. D., p. 98, in House of Lords, 16th August 1839, M'L. and Rob., p. 871; Earl of Airlie v. Ogilvy, 16th December 1852, xv. D., p. 252; in House of Lords, ii. Macqueen, p. 260; Lumsden v. Lumsden, in House of Lords, 18th August 1843, ii. Bell's App., p. 104; Hay v. Hay 11th March 1851, xiii. D., p. 946; Murray v. Murray, 26th February 1842, iv. D., p. 803; Scott, 6th December 1855, xviii. D., p. 175.

Defenders' Authorities.—Dingwall v. Dingwall, 26th February 1842, iv. D., p. 816; Maxwell v. Maxwell, 24th February 1852, xiv. D., p. 537; Little v. Little, 24th March 1853, xv. D., p. 587; Jamieson v. Campbell, 5th January 1853, xv. D., p. 337; Earl of Eglinton v. Montgomerie, 22d January 1842, iv. D., p. 425; Lockhart v. Lockhart, 20th May 1841, iii. D., p. 904; Baird Preston v. The Heirs of Valleyfield, 28th January 1845, iii. D., p. 305; Laurie v. Laurie, 13th December 1854, xvii. D., p. 181.

THORBURN OR FRASER AND OTHERS v. THORBURN—March 18.

Succession—Legacy.

Captain Thorburn, in 1833, executed a settlement, whereby he disposed of his immediate elder brother John, and his heirs and assignees whomsoever, heritably and irredeemably, "all and sundry his lands and heritages, debts, heritable and moveable goods, gear, sums of money," etc., and appointed him executor; declaring that the conveyance was under burden of certain legacies. After specifying a number of bequests to relations and others, there was a clause declaring that, if the residue falling to John did not amount to 300, the legacies to the testator's relatives should suffer a proportional reduction, to make it up to that amount; and if the residue exceeded L.300, the residue was to be divided in the same way among the same class of legatees; and, if John died without lawful heirs of his body, then the whole residue was to be divided among the legatees. John died eight days after the date of this settlement, without leaving lawful issue. Captain Thorburn acted as one of his trustees. In June 1835, Captain Thorburn purchased an estate, which, on his death, in 1855, was of the value of L.10,000. Thomas Thorburn, the son of John's immediate elder brother, was served as Captain Thorburn's heir special in these lands by the Sheriff of Chancery, and was infest. The legatees raised an action against Thomas, concluding for declarator, that the settlement was a subsisting deed at Captain Thorburn's death, and contained an effectual conveyance of his heritable and moveable property, for the purposes and under the burdens therein set forth; that the defender, as Captain Thorburn's heir-at-law, and as having made up titles to his lands, was bound to hold the lands, and to make them available for payment of the legacies, and to make payment thereof; and, for that purpose, that he should be decreed to convey the lands to the judicial factor on Captain Thorburn's estate, that they might be sold, and the proceeds applied in payment of the legacies. Lord Ardmillan (Ordinary) decreed in terms of the conclusions of the libel. The Court adhered.

Authorities.—Smith and Bogle v. Gray, 30th June 1752, Mor., p. 10803; Lockhart v. Earl of Eglinton, 31st July 1767, Mor., p. 6370; Durham v. Durham, 24th November 1802, Mor., p. 11221; Suttie v. Suttie, 19th January 1809, Fac. Col.; Snodgrass v. Buchanan, 16th December 1806, Ross' Leading Cases, vol. ii., p. 588; Torrie v. Bunsie, 31st May 1832, xi. S. and D., p. 579; Cairns v. Cairns, 19th January 1838, xvi. S. and D., p. 335; Lord Melville v. Lady Preston, 8th February 1838, xvi. S. and D., p. 457; Douglas, 14th December 1839, ii. D., p. 238; M'Aslan and Others, 17th July 1841, iii. D., p. 1263; Glasgow and Others, 5th December 1844, vii. D., p. 178; Fogo v. Fogo, 11th March 1842, iv. D., p. 163.

EARL OF WEMYSS AND MARCHE v. CAMPBELL—May 12.

Lease—Reduction.

Lord Wemyss, sub-tenant under Mr Campbell of Monzie, of the deer forest of Dalness, raised a reduction of the sub-lease, on the ground, that he had entered into the lease under essential error as to the subject let; that the forest was not one in which the legitimate sport of deer shooting could be enjoyed; and, during the months proper for that sport, it was only frequented by hinds and calves, which it was unsportsmanlike to kill. The Lord Ordinary reported the case on the relevancy. The Court held the averments relevant, and ordered issues. The Justice-Clerk dissented; observing, that the lease was entered into

after inquiries by Lord Wemyss, and no guarantee as to the capabilities of the forest for sporting purposes had been given ; all the matters averred as grounds of reduction might have been discovered by proper inquiries ; and in game leases particularly, parties were bound to make due inquiry, or require from the lessor a guarantee that the subject of lease was adapted for the purposes for which it was let.

LORD FORBES v. GAMMELL.—May 14.

Entail—Fetters.

James Gammell executed a deed of entail of the lands of Drumtochty in favour of Andrew Gammell and a certain series of heirs. By a subsequent deed, James Gammell, on the narrative of a power to revoke contained in the deed of entail, disposed the lands in favour of Andrew Gammell ; and, failing him, to another series of heirs, including Lord Forbes, and the heirs male of his body,—Declaring that “Andrew Gammell and the persons substituted to him, should be entitled to possess the lands under the foresaid deed of entail, and these presents, and on no other right or title whatever.” The second deed contained no procuratory of resignation or precept of seisin ; and the conditions and clauses of the entail were not inserted. Both deeds were recorded in the register of entails. Andrew Gammell made up his title by adjudication in implement. In the decrees of constitution and adjudication, and in the titles following thereon, the conditions and fetters of the entail were not inserted, but referred to as contained in the first deed of entail. Lord Forbes raised as action concluding for reduction of the decrees of constitution and adjudication, and charter and seisins following thereon, on the ground, that they did not contain the conditions and fetters engrossed in them at length ; and for declarator, that Mr Gammell was bound to pursue actions of constitution and adjudication in implement concluding for decree ; that he and the heirs substituted to him were entitled to hold the lands under the conditions and fetters of the deed of entail, which should be engrossed at length in the decrees, and in the charters and seisins following thereon. The defender pleaded, that the second deed was an ineffectual entail as against creditors or onerous purchasers, as was decided in the case of Gammell v. Cathcart (Countesswells entail, xii. D., p. 19),—that it imposed no obligation on the disponee to make up a title in his own favour, and execute a strict entail in favour of himself and the other substitutes, and he had already made up the only title he was bound to expedite. The court, adhering to the judgment of Lord Benholm, sustained the defences and assailed the defender.

English Cases.

BANKRUPTCY—Sale of Claim by Creditor—Doctrine as to Purchase by Trustees.—The creditor of a bankrupt *sui juris* sold his claim against the estate to A., who, on the face of the transaction, was alone the purchaser. It afterwards appeared that A. had acted as to one-third for himself, as to one-half as trustee for the assignee of the bankrupt's creditors, and as to the remainder for other parties. A bill was then filed by the creditor against A. and his beneficiaries, to set aside the sale. It was dismissed as against A. personally and the other parties, but an issue was directed by the V. C. Kindersley to try whether the plaintiff believed, or had reason to believe, that the creditor's assignee was interested in the purchase. On the general doctrine the V. C. observed,—Now, it has been said over and over again—and there is no dispute about this—that there is no rule in this court, that a trustee may not purchase from his *cestuis que trust* ; there is no dispute that there is no such rule. If

you want to enunciate any rule as to the incapacity of a trustee to purchase from his *cestui que trust*, you must introduce some other additional ingredient beyond the mere fact of their being *cestui que trust* and trustee. For example, if the trustee is a trustee for sale, then, indeed, a trustee cannot purchase from his *cestui que trust*, that is, as long as the relation of trustee and *cestui que trust* continues. So if a trustee, having superior means of knowledge by means of his office of trustee as to the value of the property, deals with the *cestui que trust*, who has not the same means, and who does not know that the trustee has the means of acquiring that knowledge, then, indeed, if the trustee deals with the *cestui que trust*, introducing that additional ingredient, the trustee cannot purchase from the *cestui que trust*. But it is quite obvious that it cannot be enunciated as a rule of the court, that a trustee cannot purchase from his *cestui que trust*. It is very obvious that there may be trustees in all sorts of different positions with regard to the *cestui que trust*, so far as would affect the question how far he can deal with the *cestui que trust*. If you take a common case of a trustee to preserve contingent remainders, nobody would say that a trustee to preserve contingent remainders, if that be all, is not a person who, like any other stranger, would be capable of purchasing from his *cestui que trust*. And so, if you advance and take the case of an estate vested in A. in fee, in trust for B. in fee, B. being a party perfectly *sui juris*, and there being no undue influence of any kind, it is obvious there is no reason why the trustee should be disqualified, merely because he is such trustee, from purchasing from the *cestui que trust*. And so you may go further, and take the case of a solicitor. A solicitor, merely because he is a solicitor, is not precluded from purchasing from his client. The court always considers that there is a sort of fiduciary character between the solicitor and client—something in the nature of a fiduciary character. The solicitor is not disqualified from purchasing from his client; but at the same time, in such a case as that, the court always looks with great jealousy at it, and requires to see that the whole thing has been perfectly fair. Perhaps the strongest case in which there could be any reason for saying that the mere naked rule ought to prevail, would be the case of an assignee, because one can hardly conceive any case in which the trustee, that is the assignee, who stands in a fiduciary character—and I call him, therefore, a trustee—in which a trustee has greater means, when he comes to deal with the creditor, of availing himself of his position, and the knowledge which his position gives him as assignee of the bankrupt, to the detriment of the person with whom he is professing to deal. But still it appears to me, that there is no rule which would prevent a person, an adult *sui juris*, there being no misrepresentation, no concealment, no undue influence of any kind—there is no reason why a person in the character of a creditor may not deal with the assignee in respect of his debt, and why the assignee is disqualified from dealing with him, so far as relates to the question of any rights or obligations as between the creditor and the assignee. The other question, whether the assignee can purchase for himself, or whether he must purchase for the benefit of the estate, is another matter." The V. C. proceeded to say, that, so far as regards the portion of the claim purchased for the assignee of the creditors, if it were a direct sale, it must, in the absence of extrinsic circumstances showing misrepresentation and concealment, be supported. But if the seller dealt with the purchaser not as agent for the assignee, then the result might be otherwise, and therefore he directed an issue to try that point. (*Pooley v. Quilter*, 30 L. T. Rep. 327.)

CARRIERS—Limitation of Liability.—B. delivered to a railway two horses, to be carried from C. to D.; the railway provided a truck apparently sufficient for the purpose, and B. signed the memorandum: "This ticket is issued subject to the owner's undertaking all risks of conveyance, loading and unloading whatsoever, as the company will not be responsible for any injury or damage, however caused, occurring to live stock of any description." The truck proved insufficient, and the horses were injured. It was held that the notice

was reasonable, and that the railway was not responsible for the injury. (*M'Manus v. The Lancashire, etc., Railway Company*, 30 L. T. Rep. 321.)

WILL—*Names and Arms Clause.*—A name and arms clause in a will provided that all the persons therein mentioned and described, as and when and within the space of twelve calendar months next after they should severally become entitled in possession to any of the said hereditaments, should assume and take upon themselves respectively the surname of Blagrove, and by such name only and no other thenceforward should style and describe themselves on all occasions, and also should bear the arms of the testator's family alone; and in case any of the persons aforesaid should refuse, decline, etc., or discontinue to take, assume, and use such surname and arms for the space of twelve calendar months after they should severally so become entitled, the estate and interest of every such person should, after the expiration of the said space of twelve calendar months, determine and cease. H. B., one of the persons referred to in the clause, became entitled to the estates, subject to the condition, in 1844. He had previously assumed the name and arms of Balgrove. He continued to use this name till 1856, when, by license, he assumed and afterwards used the name and arms of Bradshaw only. It was held that his estate ceased and determined upon the expiration of the twelve months after he ceased to use the name and arms of Blagrove. (*Blagrove v. Bradshaw*, 30 L. T. Rep. 363.)

CAPTION—*Escape of Prisoner—Measure of Damages.*—A debtor was arrested at the suit of a creditor on the 9th Nov. He was allowed to go at large till the 2d Dec., when the sheriff-officer called upon him, and arranged he should go in custody with him at three o'clock to a certain hotel. The officer called at that hour, and found the party was in his bedroom, the door of which was locked. He shot himself immediately afterwards. The officer burst open a panel of the door and saw him alive, but he died shortly after, when the officer was absent. The creditor now moved that the sheriff should pay into court the full sum for which the debtor had been arrested. To this it was replied, that there had been a recapture. The Master of the Rolls said—"I think it is clear that Mr Mozley (the debtor) was taken on the 9th Nov., and allowed to go at large on that day without bail. That this amounted to what in law is an escape, nobody can doubt, and no recapture was effected. Mozley had been allowed to go at large on his promise to surrender himself when called upon; but he broke that promise as effectually as if he had absconded at night and ran out of the country. I am satisfied from the evidence that he never was in the custody of the officer, and that he was dead before the officer approached him. The circumstances which amount to a capture are very plain. A capture requires either something approaching to a touch, or else a statement to the prisoner that he must consider himself in custody, and that the prisoner should obey and follow the officer according to his direction. I am of opinion, therefore, upon the facts, that the sheriff is liable; that there was a taking and escape; and the real question therefore resolves itself into this, in what manner and to what extent is the sheriff liable? This, he thought, was the actual damage sustained by reason of the debtor not being in custody; and therefore he would allow the sheriff to prove to what extent he would have been able, had he survived, to satisfy the claim." (*Moore v. Moore*, 30 L. T. Rep. 362.)

DIVORCE—*Scotch—English Marriage.*—This was a question of domicile, as affecting a will made in France, and turned on the validity of a Scotch sentence of divorce. Vernon Dolphin, the then husband of the party deceased in this cause, left England on the 23d day of Feb. 1854, and resided in Edinburgh and the neighbourhood until the 19th of June. His wife having discovered that during this time he was living in adultery, on the 17th June a summons was personally served on the said Vernon Dolphin at her instance, and an action of divorce before the Lords of the Court of Council and Session in Scotland was instituted. On the 20th July the Court of Session found the said Vernon Dolphin guilty of adultery, and pronounced decree accordingly. Sir C. Cresswell, after briefly stating the facts and circumstances of the case, said—"The

allegation, as reformed, does not pretend that Mr Dolphin had given up his house or establishment in England, or had gone to Scotland in any way *animò remanendi*; this being so, I cannot distinguish the case from that of Lolly, in Russ. and R. C. C. 237, or from *Beazley v. Beazley*, 3 Hagg. 639, and must hold the Scotch sentence to be invalid to dissolve a marriage contracted in England between a domiciled Englishman and woman. It was further argued that the Scotch sentence, though not good as a dissolution of marriage, might operate as a sentence of separation, and so rebut the legal presumption of the wife's domicile remaining that of the husband; but the Scotch sentence purports to dissolve the marriage, and if it is not good for that purpose, I can, in my opinion, give no other effect to it. The allegation, if proved, would be no answer to the case set up on the other side, and must therefore be rejected." (*Robins v. Dolphin*, 30 L. T. Rep. 371.)

PUBLIC COMPANY—Agreement by Promoters.—The chairman of the provisional committee of a projected company entered into an agreement by which the other party was to withdraw his opposition to the Act, and on the passing of the Act was to receive a sum of money. The bill passed; the company did not pay, but proceeded with their works. A bill for specific performance was filed, and an injunction moved, and the M. R. refused it on the ground that the company had not adopted the agreement. The Lords Justices refused to give the plaintiff the injunction sought, at least until the hearing of the cause. (*Williams v. The St George's Harbour Company*, 30 L. T. Rep. 343.)

RAILWAY—Loan for Use—Liability for Personal Injury.—At the Weston-super-Mare station of the Bristol and Exeter Railway, certain blocks of stone arrived addressed to one Harvey. The company gave notice to him to remove them, and he proceeded to do so. For delivering goods at the station the company provided a crane, which was dangerous and unsafe for the purpose. Harvey, the consignee, in using this crane, called to J. Blakemore, a bystander, but not a servant of the company, to come to his assistance. When Blakemore was steadying the chain, it snapped, and he was killed. His representatives having brought an action against the company, the Court of Q. B. held the company were not liable for the injury, as they could not be considered to have lent the crane for the use of the deceased. Coleridge, J., in giving judgment, said—"The crane was placed there in virtue of no contract with consigner or consignee, but just as any other convenience erected and allowed to be used by the public in order to induce people to send their goods by the railway. A covered and convenient station is erected for passengers; but the purchase of a railway ticket does not entitle the passenger to an action if the station be uncovered or inconvenient. He may be considered as licensed to use it so as to excuse a trespass, but he has no greater right. We think, therefore, this ground of defence fails on its first assumption. But it was said, secondly, that if no duty arose out of the contract between carrier and consignee, then the defendants stood in the situation of merely gratuitous lenders for use, and so (all fraud apart) were not responsible for any injury resulting from defects in the thing lent; and this appears to us to be the greatest difficulty which the plaintiff has to contend with. It is surprising how little in the way of decision in our courts is to be found in our books upon the obligations which the lender of a chattel for use contracts towards the borrower. Pothier, *Traité du Pret à Usage*, to be found in the 4th vol. of his works by Dupin, ch. 3, pp. 37 to 42, enters into the subject at some length, and Story also treats of it, *Bailments*, sect. 270. The principles which these two writers draw mainly from the Roman law may be the more safely relied on as engrafted into the common law; considering that the whole of this branch of our law is so mainly built on the Roman, as the judgment in *Coggs v. Bernard* demonstrates. It may, however, we think, be safely laid down that the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purposes of a beneficial use by the borrower; the borrower, therefore, is not responsible for reasonable wear and tear, but he is for negligence, for

misuse, for gross want of skill in the use—above all, for anything which may be considered as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for the defect in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. *Adjuvari quippe nos non decipi beneficio oportet* is the way in which Story borrows from the Digest; and Pothier is express to the same effect, citing, as Story does also, the instance, *Qui sciens vasa vitiosa commodaverit si ibi infusum vinum vel oleum corruptum effusumque, condemnandus eo nomine est*. This is so consonant to reason and justice, that it cannot but be part of our law. Would it not be monstrous to hold that, if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad quality, and conceal this from him, and the rider using ordinary care and skill is thrown from it and injured, he should not be responsible? The principle laid down in *Coggs v. Bernard*, followed out by Lord Kenyon and Buller, J., and by Lord Tenterden in his *Nisi Prius* cases, cited in the note, *Leading Cases*, p. 86, that a gratuitous agent or bailee may be responsible for gross negligence or great want of skill, gets rid of the objection that might be urged from want of consideration to the lender. By the necessary implied purpose of the loan, a duty is contracted towards the borrower not to conceal from him those defects known to the lender, which may make the loan perilous or hurtful to him. If then the defendants could be considered as having lent the crane for the use of James Blakemore, we should think the action well brought, for they would have lent it to raise heavy stones, knowing at the time that the machine was quite unfit to be used for such a purpose, and that it could not be so used without great danger of failing in the use, and great probability of injury to the person using it. Even if James Blakemore had been one of the men whom Harvey brought with him to remove the stone, and who were with him when he applied to have the truck brought under the crane, perhaps it might have been urged that the case fell within *Levy v. Langridge*, according to the limited construction given to it by Lord Abinger and Alderson, B., in *Winterbottom v. Wright*, 10 M. and W. 114 and 115. There it was represented to the defendants that the plaintiff's father wanted a gun for the use of himself and his sons, one of whom was the plaintiff. Lord Abinger says, 'There the gun was bought for the use of the son, the plaintiff in the action, who could not make the bargain himself, but was really and substantially the party contracting.' And Alderson, B., says, 'The principle of that case was simply this, that the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it; that was a direct fraud committed on the plaintiff.' But if in that case a friend of the father or son, by their permission, had used the gun and sustained an accident, we apprehend, according to the reasoning used in both the last-mentioned cases, no action could have been maintained by him. It has always been considered that *Levy v. Langridge* was a case not to be extended in its application. It may be urged that the defendants must be taken from the circumstances to have known that some one beyond Harvey must be employed in using the crane—and that may be so; but so also in *Winterbottom v. Wright*, the defendants must have known that some coachman must drive the mail coach, and yet the plaintiff happening to be that coachman on the particular occasion, could not sue for the damage sustained by the defective building of the coach. Moreover, although the defendants must be taken to have known that Harvey must have some assistance in working the crane, there is no ground for saying that they must have known that more would be necessary than the two men whom he brought with him, and whom he thought to be sufficient for the work. It is to be observed, too, that there is another very material distinction between this case and *Levy v. Langridge*. There wilful deceit was charged; the defendant was proved to have knowingly made a false warranty as to the gun; the judgment was founded expressly in the Co. of Ex. on the fraud, and

the damage directly resulting from it, and was expressly affirmed in error on the same ground. Here no fraud is charged, nor was any proved. A breach of duty is alleged in not providing a safe crane, and that duty, under the circumstances, would only arise from the contract in law between the lender and the borrower, and to that contract James Blakemore was in no way privy. Upon the whole, therefore, we think we should be extending the law beyond any recognised principle, and in a way which might lead to very dangerous consequences, if we held that the action was maintainable; and, therefore, the rule must be discharged."—(*Blakemore v. The Bristol and Exeter Railway Co.*, 31 L. Rep. 12.)

INSURANCE (LIFE)—Condition in Policy—Payment of Premium after days of grace.—The policies of an Insurance Company allowed thirty days of grace for payment of premium. The insured died during the thirty days, leaving the premium unpaid. After the expiration of the thirty days the person interested in the policy went to the office, knowing of the death, and the office, ignorant of the death, took it. The question was, whether it had thereby waived the premium for non-payment. The court held that it had *not* done so; that the premium had been accepted in ignorance of the true circumstances; and that the office had not intended to waive the lapse after the death of the assured. *Pritchard v. The Merchants, etc., Insurance Society*, 30 L. T. Rep. 318.)

PUBLIC COMPANY—Debentures—Unauthorised Issue.—It is no defence to an action on debentures under the seal of a public company, that the directors had no sufficient authority under the deed of settlement to borrow the money. *Ar v. The official manager of the Athenæum Assurance Company*, 30 L. T. Rep. 302.) In this case the deed authorised the directors to borrow money with the consent of an extraordinary general meeting, and it was provided also that the seal of the company should not be affixed to any document except by the consent of three directors, signed by them; and also that any policy, instrument, or receipt, requiring to be signed should be given under the hands of not less than three directors. The directors of the Athenæum borrowed of Mr Agar L.4000 debentures, which recited that they were issued "by virtue of the deed of settlement, etc., and by direction and consent of more than two-thirds of the company present at a meeting convened for the purpose." They were signed by two directors only, and sealed. In point of fact no meeting had been held, no consent given as recited; there was an entry in the directors' book, dated several days before the issue of the debentures, of a resolution "that the company's seal is affixed to the said debentures for L.4000, and that entry was signed by three directors." It was even objected that the company was not bound to repay the money it had so borrowed and used for its own purposes, since the directors had not followed strictly the directions of the deed and had obtained the consent of the company, and because the debentures had been signed by two instead of three directors. The Court of C. P. decided that the debentures were binding upon the company, notwithstanding the informality. It was also intimated by Williams, J., that it was not competent to a company to introduce into its deed of settlement provisions which virtually overruled the express directions of the statute as to the manner in which the deeds of a company shall be executed.

SALE—Simulated.—A party being in difficulties made a sham sale of his goods to a creditor, in order to protect them from diligence. An invoice was made out, a receipt for the price given him, and he took possession. On an action by the debtor to recover possession, it was pleaded that, having been a party to a fraud, he could not now set up the fraud as a ground for reducing the sale to an absolute sale. The Court of Ex. overruled the plea, there being no sale, and the property in the goods never having passed.—(*Bowes v. Foster*, 30 L. Rep. 306.)

PUBLIC COMPANY—Managers—Opening Accounts.—Mr Henry Stainton acted as manager in London of the Carron Company, of which he was also a director.

from 1808 to 1851. In 1826, having previously been paid a commission, the company passed a resolution that his salary should be fixed at L.2000, from 30th June 1825 to the 30th June 1826. The company now contend that that resolution deprived Mr Stainton of all right to commission thenceforward, in which case he is their debtor to the extent of L.69,617, with L.38,623 on account of interest. On the other hand, it was argued that the resolution remained in force for one year only, after which his right to commission revived. The M. R. affirmed the former view, and with respect to the mode of accounting, ordered his accounts to be opened back to the year 1825. They had been presented half-yearly to the shareholders at the general meetings, but they had forbore to press for an investigation, on his representation that it would be impolitic to give publicity to the state of the concern, lest it should lead to the establishment of a rival company.—(*Stainton v. The Carron Company*, 30 L. T. Rep. 299.)

INCOME-TAX—Royalty.—A lease reserved L.17, 10s. per annum as rent for the surface of a brick field, and a further sum of L.100 a-year for royalty on brick-rent, with a further royalty of 2s. for every 1000 bricks made in each year beyond the first million, clear of all deductions except property and land tax. It was contended that this was a profit made by the owner on the sale of soil, and not a rent, and that therefore the tax was payable by the landlord and not by the tenant; and the Court so held.—(*Edmunds v. Eastwood*, 30 L. T. Rep. 304.)

JURY—Mis-trial.—In a case at Liverpool, one juryman answered and was sworn in the name of another. The mistake was not discovered till the conclusion of the trial. The judges of the C. C. R. were much divided on the point, and the conviction was affirmed mainly on several grounds connected with the constitution of the Court of Review. Several of their Lordships thought there had been a mis-trial. Lord Campbell, C. J., who was among the number, said—"The law of England allowed to prisoners not only a right of challenge for cause, but also the right of peremptory challenge to a certain number; but in this case the prisoner had been found guilty by a jury of whom he had no just opportunity of offering a challenge either peremptory or for cause. This was not a case of mere misnomer, but a case of personalisation. The weight of authority seemed to him to be considerably in favour of the prisoner; and he thought that this court ought to set aside the judgment and verdict, and order a new trial." But the decision of the majority went on the second point, viz., that the court had no jurisdiction.—(*Reg. v. Moller*, 30 L. T. Rep. 309.)

BANKER—Bills paid in by Customer—Bankruptcy of Banker.—A firm of bankers became bankrupt, and at the time of their bankruptcy they held in their possession short bills paid in by a customer, which were not then due, but, as the custom was, they were duly credited by the bankers in their books. On the question whose property they were, the bankers maintained that they belonged to them, and the customer must rank on their estates for the amount. The Court of Appeal rejected this theory. The sole question, their Lordships said, was whether there had been any arrangement between the bankers and the customer that the bills were to be treated as cash before maturity. The custom of immediately placing them to the credit of the customer was only a habit of the bankers in conducting their own business, with which the customer had nothing to do, and of which he probably knew nothing.—(*Baile v. Harrison*, 30 L. T. Rep. 313.)

PARTNERSHIP—Partner Deceased—Interest of Representatives.—A and I were partners in a lead mine, which they held in undivided moieties as tenants in common from year to year after the expiration of a lease, under the Duke of Northumberland. A died, having disposed of his half of the mines and mining property by will. The question that arose was, whether his property in the mine survived to his representatives. The M. R. held upon the rule laid down in *Clegg v. Fishwick* and a great many other cases, that upon the death of a testator

is property in a mine, like property in any other partnership, still continues as property; but if the testator dies carrying on a coal-mining partnership as tenants from year to year under a landlord, there is no law in the country which makes it imperative on his legal personal representatives to carry on the trade. The case came before the L. C. (Cranworth) and the L. JJ. on appeal, when the L. C. stated the law in the following terms:—"The general rule of law is, that on the death of a partner, in the absence of express stipulation, his representative is entitled to have the whole concern wound up and disposed of; and if the surviving partner continues the trade, the representative of the deceased may elect to take his share of the profits, or charge the survivor with interest on the capital retained. If the property consists in part leaseholds, the representatives of the deceased may treat the survivor as a tenant, and if the survivor renews the lease, he is considered to do so for the benefit of the partner. This rule is subject to qualification where the trade is one of a speculative character, requiring outlay with an uncertain return. Where, if the surviving partner continues the trade in his own name, and renews the lease, the Court will not consider that the representative of the deceased partner has any interest unless he contributes a due proportion of money for the purpose of the business; as it considers it unjust to permit the creditors of the deceased partner to lie by, and allow the other to run all the risk of loss, and then, if any profit is made, to claim a share." The Lord Chancellor differed from the conclusion to which the M. R. had arrived, and thought that the testator's interest in the mine did not cease on his death. His view was supported by Turner, L. J. (Knight Bruce, L. J. *dissentiente*). The decree of the Court below was therefore reversed.—(*Clements v. Hall*, 31 T. Rep. 1.)

TRUSTEE—Auctioneer.—Where A, by deed, assigned to D, who was an auctioneer, certain timber and stock-in-trade, upon trust, to sell and apply the moneys arising from the sale, amongst other things, in paying the expenses of preparing for, making, and completing such sale or sales, including the usual auctioneer's commission, and otherwise incidental to the trusts therein declared,—it was held that the words could only have been inserted to meet the view of D himself, the trustee, acting as auctioneer in the sales, and consequently that he was entitled to charge the usual commission for selling the property.—(*Douglas v. Archbutt*, 31 L. T. Rep. 4.)

WITNESS—Incompetency of Party informed against under Game Act.—1 and 2 Will. IV., c. 32, sec. 23—14 and 15 Vict., c. 99, sec. 3.—This point occurred in *Cattell v. Ireson*, 31 L. T. Rep. 80. The question involved was, whether an information against a person under sec. 23 of the 14 and 15 Vict., c. 32 (the Game Act), for using a net or instrument for taking game, not being authorised to do so for want of a game certificate, is a criminal proceeding within the operation of sec. 3 of the 14 and 15 Vict., c. 99 (the Law of Evidence Amendment Act), which enacts, that "nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of an indictable offence, any offence punishable on summary conviction, competent or compellable to give evidence for or against himself," etc.; and the court held that it was. In the case an information had been laid against the appellant for an offence under the above 23d section; and upon the hearing he tendered himself as a witness in his own behalf, and was rejected by the justices as disqualified by reason of the provisions of sec. 3 of the 14 and 15 Vict., c. 32; and they having convicted him, and ordered him to pay a penalty of L.5, or, in default of payment, to be imprisoned one calendar month with hard labour, a case was required to be stated under the provisions of the 20 and 21 Vict., c. 43. The court were clearly of opinion that the appellant was disqualified from being a witness, inasmuch as the proceedings were of a criminal nature. In giving judgment, Lord Campbell, C.J., said, "It is quite clear that he was not admissible as a witness before the 14 and 15 Vict., c. 99; and the question is, whether

this is a criminal proceeding, or an offence punishable on summary conviction within sec. 3 of that Act. Now I think that we cannot look at the estimate we may form of the moral nature of the act which is made an offence, but we must see how it is treated by the legislature. When we look at the provisions of the Game Act, we find that it was intended to be a criminal proceeding, and an offence punishable upon summary conviction." Having read the enactments, he proceeds—"These enactments make it a crime to go in pursuit of game without having a game certificate, and one punishable by fine or imprisonment with hard labour. This is not like the case of an order in bastardy, where the mother proceeds against the putative father to compel him to pay a sum of money for the support of her bastard child; nor is it like a fiscal proceeding to protect a breach of the revenue laws; nor is it like a proceeding before magistrates to decide a civil right, or to obtain compensation for a wrong done; but it is a criminal proceeding before magistrates for an offence against the game laws, and it is so treated by the Game Act. That being so, is it not a criminal proceeding and an offence punishable on summary conviction within the 14 and 15 Vict., c. 99, sec. 3? It seems to me to come expressly within its meaning; and if it does not, I do not know to what that section would apply. Here an arbitrary fine and imprisonment, within certain limits, may be imposed by the magistrates." Mr Justice Erle, at the close of his judgment, puts the point in a very clear light. He says—"I am strongly of opinion that an offender under this Act ought not to be admitted as a witness for himself, otherwise he might be made a witness against himself, and that would be a strong infringement of the rule, that no man can be called upon to criminate himself."

MASTER AND SERVANT.—It was held, in *Puttock v. Warr*, 31 L. T. Rep. 86, that a clerk employed to obtain orders is not thereby authorised, without special authority, to receive payment for the goods so ordered. The person so paying the clerk is still liable to pay the master.

FRAUD.—A society subscribes for the apprenticeship of poor children, and one of their rules is, that nothing is to be paid by the parents. B took the son of C as an apprentice, and executed an indenture, to which the society was a party, stating that he engaged to teach him in consideration of L.20 received from the society. In fact, it was agreed between B and C that C was to pay L.20 more when he was able, and he gave B an I O U for that sum. It not appearing that B knew of the rules of the society, and had done nothing to deceive them, it was held, in an action by him against C on the I O U, that there was no fraud to vitiate the contract.—(*Westlake v. Adams*, 31 L. T. Rep. 101.)

HIRING—Custom.—B agreed with C, a woollen manufacturer, to serve him as agent, at the salary of L.150 per annum, and that if at the end of the year C should find that B had done sufficient business to justify him in making up the salary to L.180, he would do so. B brought an action alleging a hiring for a year, and a dismissal before the year's end, to which C pleaded that the contract was subject to a custom of the trade that the employer might dismiss the servant on a month's notice, and C had done so. At the trial the jury found that there was such a custom, but the hiring in the case was a special one, to which the custom did not apply, and they found a verdict for the plaintiff. It was held that the question, whether the agreement excluded the custom, was for the Court, and not for the jury, and that the verdict must be set aside, and a new trial granted.—(*Parker v. Ibbetson*, 31 L. T. Rep. 101.)

ADMINISTRATION BY THE CROWN.—Where the Crown takes out letters of administration to the estate of an intestate, it is bound by the ordinary rules applicable to all administrations, and is therefore liable, upon the successful claim of a next of kin of the intestate, to refund the intestate's property, with interest.—(*Edgar v. Reynolds*, 31 L. T. Rep. 50.)

SALE—Conditions—Rescinding Contract.—Conditions of sale must be construed, like any other instrument, most strictly against the person who frames

them, because he alone can judge of the necessity or propriety of making such conditions before he offers the property for sale. A vendor cannot make use of such a condition of sale, to rescind a contract for the purpose of getting rid of a duty which attaches to him upon the rest of the contract, namely, to make out a good title. Therefore, where the contract of sale of certain leasehold property stipulated that if the purchaser should show any objection, whether of title, conveyance, or otherwise, the vendor should be at liberty to rescind; and the vendee delivered certain requisitions on the title, the M. R. held that the vendor was not entitled to rescind the contract, without making any reply to the requisitions, although untenable.—(*Greaves v. Wilson*, 31 L. T. Rep. 68.)

APPEALS IN THE HOUSE OF LORDS.

KIPPEN'S TRUSTEES *v.* KIPPEN.

Testament—Provision to Children—Presumption.

(Court of Session—3d July 1856—18 D. 1137.)

The late Mr Kippen, by ante-nuptial contract of marriage, provided a certain sum to the children of the marriage in full of *legitim*. There were two sons and five daughters. Two daughters married, and in their marriage-contracts Mr Kippen bound himself to pay to each of them a sum of L.5000—"which was thereby accepted in full of all they were entitled to by their father and mother's marriage-contract, and of every other provision, whether legal or conventional, competent to be made against the said William Kippen's estate." He then executed a trust-settlement, which contained a declaration to the same effect, and provided L.4000 to each of his three unmarried daughters. When the third daughter, Mrs Edmiston, married, there was also a provision in her marriage-contract of L.5000, but the deed contained no discharge or renunciation of any kind, as in the contracts of the other two daughters, of all other claims against the father's estate. In these circumstances, the question arose, whether Mr Kippen had intended the provision in Mr and Mrs Edmiston's contract, to be in full satisfaction of the provisions formerly made in Mrs Edmiston's favour; or, whether they were entitled to the provision in their own marriage-contract, and also to the provisions contained in Mr Kippen's trust-settlement, and of his marriage-contract. The Court of Session, by a majority, held that the provisions were in implement and satisfaction of those contained in Mr Kippen's marriage-contract, but not of these in his trust-settlement:—

The LORD CHANCELLOR now said that, owing to the great differences of opinion among the learned judges of the Court below as to this case, and some difficulty attending its decision, it would be necessary for him to examine very carefully the various deeds and instruments upon the terms of which the case chiefly turned. (His Lordship then stated the nature of all the documents and quoted the material portions, and continued). On all these deeds the question arose, whether the provision by way of tocher to Mrs Edmiston contained in her marriage-contract was intended by her father to be in addition to the provision left to her by his trust-disposition, or whether it was to be taken to have been in satisfaction of such provision? It was strongly contended by the appellants that where the father expressly called the sum given to Mrs Edmiston a tocher, it was to be presumed that he intended thereby to extinguish all existing claims against himself, and that no express words denoting such extinguishment were necessary. It was also contended by the appellants, that there was a presumption existing in the law of Scotland against double portions, which was in that respect on the same footing as the law of England; that is to say, that a father will be presumed to have meant that the portion he gives a daughter will extinguish any legacy given by a prior will, unless it can be shown that he had a contrary intention. The respondents, on the other hand,

contended that there was no such presumption in the law of Scotland, but that the simple question was in each case, What was the intention? and that that must depend on the special circumstances—in other words, that there was no general rule at all. Now, in England the leaning of the courts against double portions was a doctrine which had long been settled, and whether it was an artificial rule or not, and whether it might in some cases lead to a disappointment of the father's intentions, still it was too firmly fixed to be lightly departed from. Whether a similar rule existed in Scotland the greatest diversity of opinion prevailed. In order to show how little assistance from the learned judges in Scotland as to this point could be obtained, he would deem it sufficient to select one or two of the learned judges who alluded to the subject. The Lord Justice-Clerk said that it must be kept in view that "there was no rule or legal presumption in the law of Scotland that a provision to a daughter in her marriage-contract supersedes or evacuates or recalls a bequest in favour in a prior testamentary writing," and he said the law of England in this respect seemed widely different. So Lord Curriehill had stated that they had been severely reprobated by English judges, and the English cases were not authorities to be followed in this case. On the other hand, Lord Ardmuir, though agreeing with the majority of the judges, confessed that he thought there was no such difference between the English and Scotch decisions as Lord Justice-Clerk assumed. Again, Lord Deas said he was confirmed in his view of this case all the more when he found the same principle recognised and acted on in an enlightened system of jurisprudence like that of England, founded on views which recommended themselves by their natural justice, by their common sense. In this unfortunate conflict of opinion among those who might be considered the natural guides of their Lordships' House in matters of this kind, he had carefully considered for himself the decisions of the Scottish Courts as well as the text-writers, and after such careful consideration he confessed that there was no satisfactory proof to his mind that such a rule of presumption as that contended for by the appellants, and such as existed in England, was applicable to a case of this kind. There was undoubtedly a limited rule of which there was ample proof, viz., the rule of *debitor non sumitur donare*. That rule, however, was so far from corresponding to the English rule that in the present case it would lead to a contrary result. It appeared that, according to the Scotch text-writers, provisions to children used to be made by way of bonds of provision, which were effectual without delivery, but if undelivered no debt was thereby contracted, and therefore the maxim did not apply to that case. The text-writers did not clearly lay down the rule that a tocher was presumed to be in lieu of all provisions left by will or bond of provision. Erskine was the only writer who seemed to go the whole length, contended for by the appellants; but, as Lord Fullerton in one case remarked, all the authorities referred to by Erskine were cases where the prior provision was in *obligatione*, and thus the maxim before referred to clearly applied. The cases in Morison's Dictionary were of that kind. The later cases were inconsistent with the notion that any such general presumption existed. He had therefore come to the conclusion that there was no such settled presumption in the law of Scotland in cases of this kind. Then the only principle on which the present case could be decided was, what was the intention of the father in giving this tocher? That could only be discovered by an examination of all the deeds taken together. It must be observed that when a father who has left a certain sum to a child by will afterwards gives that child an equal or greater sum on her marriage, there was no sound reason for the law forcing on the father a certain intention which might never exist. There was no antecedent improbability against a father's favouring one child more than the others; it was not an uncommon thing. Applying these observations to this case, there was no sufficient proof of any intention of the father to treat all his children alike. He had obviously placed the unmarried daughters on a less favourable position than the married daughters. The circumstance that there

was no clause expressly stating that the tocher given to Mrs Edmiston was in satisfaction of all other claims was a strong circumstance in her favour. Then the codicil showed that the father's intention must have been directed to the change which her marriage must have produced on her claims under the trust-disposition, and yet he said nothing to show that the previous provision was thereby satisfied. Looking at all the circumstances, therefore, his judgment proceeded on the ground that a party must be allowed to express his own intentions, and it was not for the Court to speculate as to what it might be supposed he would have done in such circumstances if influenced by the extrinsic probabilities of the situation; and on this ground he agreed with the majority of the judges in the Court of Session, in holding that the tocher given to Mrs Edmiston was not in satisfaction of the provision left by her father's will.

Lord CRANWORTH said that this question had been very elaborately argued in the Court below, and the majority of the judges there had come to the conclusion that there was no presumption in the law of Scotland against double portions, and that Mrs Edmiston was entitled to take both her tocher and the L.4000 bequeathed by the father's trust-disposition. He confessed that he came to a contrary conclusion from that of the Court below and that come to by his noble and learned friend on the woolsack, and he believed also from that come to by his noble and learned friend opposite (Lord Wensleydale). Though his opinion would thus have no effect on the decision of this case, he still thought it necessary to state shortly the grounds on which he proceeded. He thought that there was a presumption against double portions in the law of Scotland, and, moreover, that such presumption was not rebutted by anything contained in the present deeds. He relied on the text-writers and authorities for the former proposition. Stair, Bankton, and Erskine were deferred to in Scotland as Coke and Lyttleton would be in England, and, looking to them, it was manifest that they all laid down the proposition contended for by the appellants. In Lord Stair's time the law had not been so clearly developed; but Bankton and Erskine were too precise to be got over. He therefore came to the conclusion that the same presumption against double portions existed in Scotland as existed in England. It had been said that the English judges had often condemned the rule in England, but he doubted if that was correct, for no judge had ever said it was not a principle that ought to prevail; in fact it was common sense, and he took it to be quite obvious that in 99 cases out of every 100 where a father has left L.10,000 by will to his daughter, and afterwards, on her marriage, gives her L.10,000 as a marriage portion, the father's intention will be defeated if the daughter were allowed to claim both sums. The rule was clear in England, and unless Bankton and Erskine were to be entirely disregarded, it was equally clear in Scotland. In Morison's Dictionary there was a whole chapter of cases showing that a tocher was an implied discharge of prior provisions by will. It was said that they were all cases where the prior provision was in *obligatione*, but though that, in his opinion, would make no difference whatever, still there were at least two cases where the prior provision was not in *obligatione*, but was a mere revocable legacy. In the more modern cases the judges seem all to have gone upon the same principle, and one of the highest authorities in the law of Scotland, the late Lord Moncreiff, had said the rule was settled. On these grounds, as well as on other matters indicative of the intention of the father, he concluded that the minority of the judges in the Court below had been right in this case.

Lord WENSLEYDALE said the first question in this case was whether there was any such presumption against double portions in the law of Scotland as was established in the law of England. Though that was a very important question in a general point of view, still he thought that, whether there was such presumption or not would make no difference in his judgment in this case. He had examined all the authorities referred to in the arguments at the bar, and he agreed with his noble and learned friend on the woolsack, that he was not satisfied that such a rule did exist in the law of Scotland, except in

the cases where the prior provision was in *obligations*. The sole question seemed to be always what was the intention, and that again depended on the expressions used in the particular case. He agreed generally with the grounds stated by his noble and learned friend on the woolsack, though he placed more reliance on some of the circumstances. Upon the whole, he thought the majority of the learned judges in the Court below were right.

Affirmed without costs.

ANDERSON *v.* ANDERSON.—April 16.

Will—Holograph—Onus probandi.

Court of Session, 22 *Jurist*, 478.

This was an appeal against an interlocutor of the First Division of the Court of Session, finding it proved in point of fact that the testamentary letter founded on by the claimant Peter Anderson, is not the genuine writing of the deceased Alexander Anderson, and finding in point of law that the said Peter Anderson is not entitled to be declared or confirmed as executor of the said Alexander Anderson. The principal question raised in the appeal was as to the *onus probandi* in the case of a holograph will: the appellant contending that having proved that the writing in question was a holograph, he had done enough to throw upon the respondent the burden of showing that it was not a genuine document, but a forgery.

The following cases were cited:—Waddell's Trustees' Case, May, 1845, 7 B.M.Y.T., 605; Turnbull *v.* Dodds, February, 1844, 6, B.M.Y.T., 896; Lord Stair's Instit., 4, 42, 6; Erskine's Principles, 3, 2, 22; Robertson's Case, Dec., 1844–7, Sess. case, 605; Bell's Principles.

THE LORD CHANCELLOR.—The burden of proof was properly thrown by the judges upon the appellant in this case. He came before the commissary claiming to be confirmed executor, upon an alleged testamentary letter of the deceased, upon which his title entirely depended. In order to establish his right to be the executor of Alexander Anderson, it was necessary for him to show that he had been so appointed by some testamentary writing of the deceased. This could not be done by merely producing a document all in one handwriting, and bearing the signature of Alexander Anderson. This is scarcely half of the requisite proof. The essential part,—that without which all the rest is irrelevant,—is to show that it is the handwriting of the deceased, whose name it bears, or in the words of the appellant's own plea, that it is "holograph of the testator." The case of Turnbull *v.* Dodds is in my mind no authority for the position that the party propounding a testamentary instrument, has done enough by showing it to be all in one handwriting, to throw upon the party opposing it, the *onus* of proving negatively, that it is not the handwriting of the testator.

LORD CRANWORTH.—The proposition contended for is very startling. When a man produces an instrument and says, this is a will which is to deprive the next of kin of that to which they would otherwise be entitled, and it is disputed, you should call upon him to prove the instrument. I have no hesitation in saying that, in the absence of express enactment or distinct authority, this is the law which your Lordships ought to lay down, as that which is to guide the courts of Scotland in future.

LORD WENSLEYDALE.—It is contended that if any person sets up a case of forgery (the whole of the paper appearing to be in the same handwriting) he is bound to prove the case of forgery. If that were so, it would be an extraordinary circumstance in the law of Scotland, and entirely at variance with the established law in England. It is not enough to produce an instrument which appears to be holograph; it must be proved to be in the handwriting of the testator. You cannot begin by putting in a paper which may have been written by anybody, and which appears to be all in the same handwriting, but you must prove that that is the handwriting of the testator. That was the unanimous opinion of the Court of Session.

THE

JOURNAL OF JURISPRUDENCE.

LAW REPORTING AND SCOTTISH LAW IN THE HOUSE OF LORDS.¹

MR M'QUEEN is far above his work. His place is not at the bar of the House, but upon the woollack. He is not the mere conduit-pipe of other men's opinions, but the dispenser of many valuable ideas of his own, which he throws broadcast to an ungrateful public. His work is not so much a collection of reports, as a commentary upon them, interspersed with funny ana,—some new, and very many old. He criticises, he elucidates, he censures and applauds. From the Chancellor himself to the Junior Lord Ordinary, no judge escapes without a reprimand; and it makes one tremble for the great interests imperilled in courts of justice, to find how many rebukes are given and how few eulogiums.

Mr M'Queen's reports, moreover, satisfy the most fastidious lover of fine books. Here will be found the small rivulet of print running down the wide meadow of margin. One is ashamed to bind so beautiful a work in the ordinary law calf; it is for the drawing-room, and not for the rough work of a lawyer's practice. Of course we cannot expect, with so many advantages, that it should have every merit. It would be unreasonable to ask for quantity when we have got so much to satisfy the eye. Yet we fear that the learned reporter has had too distinct a recollection of the undoubted truth, that brevity is in writing what charity is to all the other virtues. It often, no doubt, is productive of the two advantages of

¹ 1. Reports of Scotch, Peerage, Divorce, and Practice Cases in the House of Lords. By John F. M'Queen, Esq. 2 vols.

2. Reports of Cases decided in the House of Lords upon Appeal from Scotland. By Thos. S. Paton, Advocate. 6 vols.

3. Law and Practice in Appeals. By Thos. S. Paton. 1858.

saving money and saving time; though, in the present case, by reason of the fine type and fine paper, we are not benefited in the first particular; and by reason of the extreme brevity and obscurity, we are equally baulked of the latter advantage. The dull details, without which law reporting can never be of use, do not consort with a genius which likes to indulge itself rather in the correction of judicial blunders or the resuscitation of obsolete *ana*. In particular, we miss in these reports, that without which such publications are worse than useless,—a statement of the facts to which the law is applied, and a resumé of the arguments of counsel. For that statement and that resumé, all that we are obliged to content ourselves with, is a reference to the reports in the Court of Session, and the speech of the Chancellor in the House of Lords. The stereotyped mode in which Mr M'Queen discharges this part of his duty may be taken to be this:—

"The facts and circumstances are sufficiently disclosed by the following opinion, delivered in moving for judgment by the Lord Chancellor, *Sawers v. Russell*, vol. ii., p. 76."

"The circumstances are stated in the following opinion, delivered in moving for judgment, by the Lord Chancellor, vol. ii., p. 93."

"The circumstances, which were extremely special, and the question, which was one of mere construction, are fully disclosed in the following opinions (vol. ii., p. 152)."

Sometimes the form is varied, as thus:—"This case is fully reported in the second series of the Court of Session Cases; the question, one of conveyancing and extremely technical in its character, is stated with much detail by the Lord Chancellor, *Norton v. Stirling* ii. M'Queen, 205."

"The argument on both sides is exhausted in the following opinion of the Lord Chancellor, ii. M'Queen, 494."

The cunning reporter, too, when he has a good excuse for being brief, wishes us to believe that it is with the greatest reluctance he abstains from giving us the details. Thus, for example, in reference to the case of the Morgan Succession, we are to understand that if it had not been for the extreme loquacity of the law peers, we would have seen what we would have seen, in the shape of a detailed report:—

"The questions," says the reporter, "are gone into so fully by the law lords in delivering their opinions, and that report is consequently so expanded, that the arguments of counsel are *by necessity* omitted (vol. ii., p. 344)."

It is necessity that compels him to be brief. In general, he models his reports upon the style of Tacitus, and as if he were writing advertisements for poor persons; but in this particular case he would have expanded himself, but for the law lords, into dimensions that would have satisfied the most insatiable appetite for reading. It is not indolence which is at the bottom of it all. Mr M'Queen has educated himself after the fashion of Pythagoras's

ion in London, when he is, *con amore*, dealing with a Scotch peal. We admire, and are astonished. The intellectual ability the man is never more displayed than in the happy audacity with which he deals with a foreign law, with which he is only a little less ignorant than the judges he addresses. But it is the style in which he assails the Scottish Judges for their "millincolly collection of coherent sintinces,"—"their mistaking dogmatic utterances of opinion for reasoning,"—"their working jury trial in such a way as to render it no longer doubtful whether it was an evil to the barren part of the Queen's dominions," etc. etc.,—that at once attracts the attention of a stray Scottish lawyer, and gives him a subject of amusement as entertaining as anything at the Olympic. Of course, such a man deserved, and has received, justice at the hands of the reporter. When Sir Richard means to say that the point is one of feudal conveyancing, he says that "this is not a question of feudalities." A case is decided against him, whereupon he rises, and, transfixing with a look the peccant Chancellor, thus rebukes him—"My Lords, this amounts to a complete denial of justice" (vol. ii., p. 204); and due importance is given to it in the rubric,—"Remark by the Solicitor-General" (vol. ii., p. 177). Again, he is astonished at a judgment of the Court of Session, and the reporter chronicles his feelings,—“A judgment which the learned Solicitor-General designated as ‘a singular one’” (vol. ii., p. 493). These lively sallies add animation to the reports; and the only things wanting are wood-cuts, representing the different varieties of professional emotion—surprise, contempt, indignation, and disgust—the ignorance, stupidity, and mulishness of these Scottish Judges. But great as Sir Richard is, he of course only plays a secondary part in the presence of the reporter himself. The advocate is only engaged in the duty of his office, in exhausting the vocabulary of supererogation against the decision he is employed to condemn. The reporter exercises a purely gratuitous office in offering his views as to the importance of particular cases. We have already seen the space assigned for brevity, in regard to the decision on the Morgan succession. We have a different one in regard to the case as to the right of an able-bodied pauper to alimony. "The report of the proceedings in this and the next case is concise; because, admitting their importance, the profession and the public have already had enough of them" (vol. i., p. 120). How do you know this? What is the object of a law report? Is it to satisfy a passing interest, like that excited by a hustings speech, or is it to preserve, not to the contemporary, but to all generations, a record of the grounds upon which a judgment—in this case affecting the condition of millions—has been rested? Why not say that the reporter is wearied with the case, and not put the blame on the much-enduring public, who, when being satiated, are ever eager for information? Would not more labour to give us an intelligible...

or the party, or the counsel, or the judge? and what is the precise value of it when he does "semble?" And what does "marshalling" one's securities mean? In regard to the latter word, it is true, the learned reporter has taken compassion upon our ignorance; but alas! his explanation dissolves in mist. "Nubes et inania captat." "The marshalling of securities for the purposes of justice is but an English phrase to express a familiar Scottish operation" (vol. ii., p. 442, note).

Now what is a familiar Scottish operation? Does he mean to insult us? Has it any reference to the cuticle?

We have said that Mr M'Queen is a critic, and we do not mean to quarrel with his criticisms. They have the merit of being brief, and therefore he will never be placed in the Walhalla of bores. All that we complain of is, that we have not sufficient substantial fare with all this condiment. It must also be admitted, that if Sir Richard be his pet hero, Mr M'Queen hits the judges right and left. Even the Chancellor is patted on the back occasionally. He makes a statement of a case which the reporter commends. "His Lordship's statement, though from memory, is quite correct" (vol. ii., p. 482, note); and therefore, with this guarantee, we may all take it without doubting. The Judges in the Court of Session do not give the same satisfaction. The Lord Justice-Clerk, in the case of the Edinburgh and Glasgow Railway Company against the Town of Linlithgow, states the facts of the case as he understood them, and is thus reproved:—"These details it will be difficult to collect from anything in the cause" (vol. i., p. 29, note).

Lord Medwyn, in the same case, is also set right upon the law. "If," says the reporter (in reference to a remark by Lord Medwyn), "the land was purchased from the burgesses alone, the magistrates must have been the superiors or lords of the property." We always understood till now, that magistrates in royal burghs acted simply as the commissioners of the Crown. Although, however, the reporter finds cause for censure in several instances, he, upon the whole, is satisfied with the opinions of the Court of Session in that case; and he sees an element in them which is often too sadly wanting in law reports. "They are *entertaining*, as well as argumentative and instructive." Mr M'Queen's own report is in itself also exceptional, as it contains a resumé of the argument of counsel, which was somewhat incomprehensible till we stumbled upon the following note:—"This argument was taken from the notes of Mr Bell," the preceding reporter, now a judge at the Cape. His is the example we entreat Mr M'Queen to follow. Let him sit upon his three-legged stool at the bar of the House from ten to four, and patiently do as Mr Bell did,—and he may perhaps in time reap a like reward.

The great hero of these reports is the renowned Sir Richard. We meet him at every page; we almost think we hear the musical tones in which he minces the Queen's English. It is the best exhib-

bition in London, when he is, *con amore*, dealing with a Scotch appeal. We admire, and are astonished. The intellectual ability of the man is never more displayed than in the happy audacity with which he deals with a foreign law, with which he is only a little less ignorant than the judges he addresses. But it is the style in which he assails the Scottish Judges for their "millincolly collection of incoherent sintinces,"—"their mistaking dogmatic utterances of opinion for reasoning,"—"their working jury trial in such a way as to render it no longer doubtful whether it was an evil to the northern part of the Queen's dominions," etc. etc.,—that at once fixes the attention of a stray Scottish lawyer, and gives him a subject of amusement as entertaining as anything at the Olympic. Of course, such a man deserved, and has received, justice at the hands of the reporter. When Sir Richard means to say that the point is not one of feudal conveyancing, he says that "this is not a question of feudalities." A case is decided against him, whereupon he rises, and, transfixing with a look the peccant Chancellor, thus rebukes him—"My Lords, this amounts to a complete denial of justice" (vol. ii., p. 204); and due importance is given to it in the rubric, thus—"Remark by the Solicitor-General" (vol. ii., p. 177). Again, he is astonished at a judgment of the Court of Session, and the reporter chronicles his feelings,—"*A judgment which the learned Solicitor-General designated as 'a singular one'*" (vol. ii., p. 493). These lively sallies add animation to the reports; and the only things wanting are wood-cuts, representing the different varieties of professional emotion—surprise, contempt, indignation, and disgust—at the ignorance, stupidity, and mulishness of these Scottish Judges.

But great as Sir Richard is, he of course only plays a secondary part in the presence of the reporter himself. The advocate is only engaged in the duty of his office, in exhausting the vocabulary of vituperation against the decision he is employed to condemn. The reporter exercises a purely gratuitous office in offering his views as to the importance of particular cases. We have already seen the cause assigned for brevity, in regard to the decision on the Morgan Succession. We have a different one in regard to the case as to the right of an able-bodied pauper to aliment. "*The report of the proceedings in this and the next case is concise; because, admitting their importance, the profession and the public have already had enough of them*" (vol. i., p. 120). How do you know this? What is the object of a law report? Is it to satisfy a passing interest, like that excited by a hustings speech, or is it to preserve, not to the contemporary, but to all generations, a record of the grounds upon which a judgment—in this case affecting the condition of millions—has been rested? Why not say that the reporter is wearied with the subject, and not put the blame on the much-enduring public, who, so far from being satiated, are ever eager for information? Would it have cost more labour to give us an intelligible report of the great case of *M'William*, than to insert in every nook and cranny such

childish prattle as we have at vol. i., p. 196, where "Lord Brougham asked what the appellant would gain by succeeding; Counsel answered—'The satisfaction of settling the law.'" If counsel were foolish enough so to answer, the reporter was still more foolish, and highly reprehensible, in printing it. And is it possible to conceive any man serious who gravely prints as the rubric of a case, a thing like this? "In excepting to the ruling of a judge, it is a great irregularity to represent the judge as having decided something different from that which he really has decided" (vol. i., p. 196). We had almost forgot that Mr M'Queen is as hard upon the Scotch bar as upon the bench. He has an original note as to the famous case of the York Buildings Company, which settled that a trustee cannot purchase, even at a public sale, the subjects he himself exposes to auction. He gives references to speeches of noble and honourable lords who apply to it all the adjectives indicating laudation and importance; and he adds, "Messrs White and Tudor cite it in their leading *equity* cases; but Mr Ross omits it in his *similar* work on Scotch Law, a circumstance which is mentioned, not as impeaching that most useful collection, but simply as showing that this case, which has always been regarded as a ruling authority in England, is comparatively forgotten in the country from whence it came" (vol. i., p. 481).

Mr Ross published three admirable volumes, but not one of them contained *equity* cases; and Mr M'Queen, before he charges us all with ignorance, might have taken the trouble—even he might have done this—just to rise from his easy chair and read the titles of Mr Ross's volumes. They refer to the dry department of Scotch feudal conveyancing, and his plan did not warrant him in printing the "great case" whose history Mr M'Queen so minutely traces. "Mr Forsyth, indeed," says Mr M'Queen, "in his learned work on the Law of Trusts in Scotland, gives somewhat of a legislative character to the York Buildings Company v. Mackenzie, by observing that 'it introduced a principle into the Scotch law from that of England,'—which is all he has to say of it, and which shows how little the case has been adverted to in the Court of Session."

Because Mr Ross omitted what he would have been guilty of bookmaking had he inserted, the case has been forgotten by the whole profession in the country from whence it came. Because Mr Forsyth mentions it, and states it as the law of Scotland, in his curt way, it has been little adverted to by the Court of Session. Mr Ross duly inserted the case in his second series when the subject permitted it, and punished Mr M'Queen as he deserved.

Now, if Mr M'Queen is to step out of his province as a reporter—as a patient inditer of other men's ideas—and insist on becoming a historian of contemporary jurisprudence, we require from him the humble virtue of accuracy; we beseech him also to believe that there do exist north of the Tweed (even though Mr M'Queen has left us) a few men who have some reverence for departed learning,

and some appreciation of the value of a great decision. Had he read patiently before he had written foolishly, he would have found the case many times referred to in the decisions of the Court of Session since the judgment was delivered in the House of Lords. In the law of trusts it is the most familiar; though its application to particular facts is not always admitted.¹

But our criticism, even though the subject be so fertile a one as the labours of this original reporter, must end;—we write only for Mr M'Queen's good and our own happiness. The misfortune attendant upon his work is, that a certain number of unhappy men *must* read him. He cannot, like other over-facetious or over-dull authors, be reserved for a rainy day. He must be studied as a matter of duty; and the thralldom renders all the more unbearable the provocations we receive. Yet we would have let Mr M'Queen alone, had it not been for that last straw which he put on the uncomplaining animal, and under which it fell. He printed no less than 109 pages of evidence, reports, statistics, and equally interesting reading, on the subject of the Appellate Jurisdiction, every word of which had previously been better reported in the newspapers, and in reference to which, not one reader in a hundred had any other opinion than that the mass was rubbish, and the printing it a specimen of not very creditable bookmaking.

We cannot, however, bid Mr M'Queen farewell, without thanking him for being the means of compelling us once more to renew acquaintance with half-forgotten decisions; and this reading suggests other considerations than the breaking a poor fly upon the wheel. Here is a court which constitutes the last refuge of the oppressed, presided over by men ignorant of the laws they are called on to administer. In the history of the civilised world there cannot be found a more startling anomaly than this; and the wonder is increased, by the stern and fixed resolve of the Scottish people, that until a better system be established, the existing one shall remain. The Chancellor of Great Britain is a man who, until the hour of his elevation, looked upon the law of Scotland with the same interest, and had of it the same knowledge, as upon, and of, the savage customs of the wildest and most barbarous horde that roamed the desert. He is elevated to command before he has the least acquaintance with the laws he must enforce. A man who never practised in appeals, —who, up to the day of taking his seat on the woolsack, was only in one single case from Scotland,—is authorised by the constitution, to reverse the solemn judgment of the thirteen sages who have devoted their lives to the study of Scottish law. The very language of that law is to him an unknown tongue. We know that Lord Chelmsford, anxious for the best information, is a careful student of this *Journal*; and we now ask him, when he has arrived at this sentence, to lay down the book and define a precept of *clare constat*, —a resignation *ad remanentiam*,—or state the difference between a

¹ See *Fraser v. Hanky and Co.*, 13th Jan. 1847, 9 D. 415.

holding *a me* and *de me*. Of course the attempt would be as vain as to ask a man to translate a foreign language which he had never studied, or seek from a great scholar an exposition of a different science from that which he professed.

We avow the most unbounded reverence for high talent, and worship the majesty of a great title. Yet it does sometimes excite somewhat more than a smile, to find in these reports passing observations so grossly incorrect, that they would startle even the smallest writer's clerk of the smallest writer in South Uist or Skye. Apparently the noble and learned lord had not the least conception of his subject, who spoke of *recording* an advocacy in the Court of Session (vol. ii., p. 24); and yet he rolls on, in mellifluous periods, as if he were an inspired oracle rebuking the rashness of subject jurisdictions.

A learned member of the Scotch bar, in a pamphlet published in the year 1852,¹ has made merry with the blunders of several Chancellors. We scarcely think the inference of unfitness and inefficiency fairly deducible from such illustrations; and there is little good in bringing into disrepute a tribunal which has proved to Scotland one of the greatest blessings conferred by the Union. Holding this opinion with the sincerity and conviction derivable from practical experience, it seems at least of questionable policy to repay benefits by ridicule. We must reap the tares with the oats. The preponderance is on the side of benefit; and ingratitude is not yet among the catalogue of virtues.

A writer—(a correspondent)—in a recent number of this *Journal* has recorded it as his opinion, that the House of Lords ought no longer to be the tribunal of appeal, and that the decision of the Court of Session should be final. Till this inconsiderate opinion was published, it was the general belief that Lord Aberdeen stood alone. The writer should, perhaps, have sought some other medium than a *Journal* professing to represent the opinions of Scottish lawyers for the circulation of a view so opposite to theirs.² From the day when the first appeal was entered until now, we believe that we state the all but universal conviction of educated Scotsmen, that the abolition of the right of appeal would be a national misfortune, and justify a revolution.

We say this emphatically, irrespective of the character of particular judges in Scotland. Though they had all the intellect and

¹ The Appellate Jurisdiction; Scotch Appeals. Edinburgh, A. and C. Black. 1851. A pamphlet worthy of the subject and the author.

² [The late Mr Lockhart was accustomed to say, when inconsistencies between one number of the *Quarterly Review* and another were pointed out to him, that he thought he discharged his duty as editor sufficiently, if he preserved consistency in each number. We can do no more. No editor can control an unruly corps of *collaborateurs*. He can only prevent an open quarrel by judicious silence as to the authorship; and if there be two opinions in the profession, it is only fair that both should be heard.—ED. J. J.]

weight of Blair, or Forbes, or Moncreiff, it would not alter the rational conviction. In the last century there were causes leading to that conclusion, which exist no more. Venality and corruption, —and, still more, sectional and party fury, polluted the stream of justice, down to a period within the memory of living men. The blackest page in the history of Scottish jurisprudence,—not even excepting the Stuart times,—was, when Braxfield trampled law and justice under foot, in a court where he could, without the fear of an appeal, give full scope to the political enmities of his day.

In our times we breathe a purer atmosphere, and are fanned by a fresher breeze. The press and public opinion have controlled the courts of justice. If the judges err, they do not shock decorum by their violence, or set public opinion at defiance. Over all Scotland, we believe that neither personal feeling, nor political bias, nor religious difference influences the decision of a single judge. The one motive is to administer the law impartially, and do justice as between man and man. But human nature is fallible, and judgments may be hasty, and the mind is clearer at one time than another. Passion, pride, self-love, indolence, warp the intentions and pervert the intellects of the wisest and discreetest men. It is desirable to have a check; and any man acquainted with the Small Debt Courts, or the decisions of the Court of Justiciary, will be the last to denounce the right of appeal.

Let us pass the small game for the time. The Small Debt Courts may be left to another occasion. The interests at stake here are unimportant, and their influence is unfelt. But the Justiciary deals with our liberties and lives, and every retrograde step which it takes is a stab to public liberty.

According to an uncertain tradition, having its origin in stormy days of the olden time, this Court assumed the power, not merely to declare and apply acknowledged law, but to declare a thing to be a crime which had never been so declared before. It must be seen at once, that the legislative as well as the judicial power is here assumed. Baron Hume states it thus :—"It seems to be held in England, that no court has power to take cognizance of any new offence, although highly pernicious, and approaching very nearly to others which have been prohibited, until some statute has declared it to be a crime, and assigned a punishment. With us the maxim is directly the reverse; that our Supreme Court have an inherent power, as such, competently to punish (with the exception of life and limb) every act which is obviously of a criminal nature, though it be such which in time past has never been the subject of prosecution" (vol. i., p. 12).

The question came to be tried in the year 1838, in the case of *Bernard Greenbuff* (2 Swin., p. 236), when the majority of the Court, among whom we find, with deep regret, the name of Lord Moncreiff, affirmed this doctrine. Lord Cockburn stood alone in

the minority; and if he had never done another thing for his country, than deliver the speech he then did, he would be remembered so long as constitutional freedom is dear to mankind. One judge, no doubt, while asserting that this irresponsible Court can punish anything "arising from the altered manners or increasing corruptions of the age," thought he saved himself by saying, that he and his brethren "were quite unanimous in desiring that the power of the Court should never be stretched beyond its proper limits." In other words, it depends upon the varying opinions of the seven judges of the Court of Justiciary, to gauge the morality of the times—to ascertain where frivolity and levity end, and corruption begins—to determine, in short, without control and without appeal, that Thomas Muir was a felon, for asserting the right which in this latter age we all enjoy. "No example," said Lord Cockburn, "of the occasional effect of this can be more admonitory, than that which is afforded by the case which occurred here not very long ago, when simple combination by workmen to raise wages was for the first time, made the subject of indictment at common law. No case was ever disposed of by any court with greater deliberation; and I am not questioning the legality of the result. But the fact is, that there being no precedent, or any other direct and conclusive authority, the relevancy of the charge was discussed and sustained solely on the ground that the act was criminal, *because it was dangerous*. There was no other idea or view taken of the case on the bench. Yet in the course of a very few years it was determined, as deliberatively, by Parliament, that this was not only not dangerous, but that it might be meritorious, and was often necessary; and these concerts, instead of being kept under the ban, are now placed under the positive protection of the law. These unseemly discrepancies between the wisdom of judges and the wisdom of senators, will always be occurring, where courts, instead of walking upon strictly judicial principles or precedents, forestall the remedial superintendence of the Legislature, by yielding to the temptation which good minds must always feel to avert supposed public inexpediency, or to punish clear moral delinquency by peremptory visitation on their very first appearance."

Can there be the least doubt, that if there had been an appeal to the House of Lords, that judgment would have been reversed? It is so utterly alien to all the maxims of the British constitution, that it is impossible to anticipate any other result. The precedents which were said to justify it could have been outnumbered a hundred-fold for the use of torture.

There may have been a period in our history, when Parliaments were occasional, and their action difficult, during which such a power in a court of justice might be a good. In the sixteenth and seventeenth centuries man's life was full of traps and pitfalls; of hairbreadth accidents by flood and field; more waylaid by sudden and startling alarms; it stumbled upon danger unawares; the excesses of the

passions and of lawless power steeped in blood the very throne; and the people who thus lived borderers on the savage state—on the times of war and bigotry—might find in a high and domineering court a protection from a worse oppression. But these days are gone, never to return; and the necessity which justified the judicial usurpations of the sixteenth century, cannot be pleaded in support of an invasion of constitutional freedom in the nineteenth. The legal mind is the slave of precedent; and there will always be among lawyers a certain number, ready to bow before old authorities, wholly irrespective of the men who made them, the times of outrage in which they originated, and the character of the judges to whom we owe them. Such men would preserve what they never would have originated, and revive what they would have helped to oppose. It becomes us now to bring the theory of the law into consistency with its practice. In our courts of justice, the protection of the rights of men, in all the complicated relations of society, is exercised by the light of conscience and the rules of justice. But there may come a time when public opinion is feeble, or when it is in error. The sobriety of the judgment-seat may be overthrown; and a judge like Braxfield may condemn as a felon, the man who, in the next age, is glorified as a patriot and a martyr.

The judges by whom this decision was pronounced are all gone. The time has come when the principle it involves should be reconsidered, and a judgment pronounced which will wipe away a blot from the law of Scotland.

In saying that the House of Lords would have reversed this decision, we draw our conclusion from the general tenor of its practice. How nobly it vindicated, in the case of O'Connell, the privileges of the accused! how well it asserted, in the Braintree case, the right to vote, of popular assemblies! and how sternly it guarded morality and public policy in the Bridgewater case, when it declared void a condition attached by Lord Bridgewater to a bequest of large estates, that the devisees must obtain elevation in the peerage within a certain time! The question to be decided was, whether the right of an individual to dispose of his estates entitled him to put it in the power of the ministers, for the time being, to give L.70,000 a-year to a particular nobleman as the reward of his support:—"That," says Mr Phillimore, "such a condition was immoral, and adverse to the most precious social interests; that it was inconsistent with the dignity and independence of the House of Lords, no one who was at all acquainted with the political history of the country, with its actual condition, or the trusts confided to the House of Lords, in our balanced government, could deny. Nevertheless, all the common law judges, with two exceptions, and Lord Cranworth, the Vice-Chancellor, held the condition valid; and if I wanted to illustrate the value of the study of scientific jurisdiction, I could find no better topic than such a decision (the arguments in favour of which will not raise us in the opinion of posterity) would supply. Fortunately for

the country, there existed a Court of Appeal from the decision by which the will had been upheld; and by that tribunal, consisting of lawyers who had turned their leisure to account,—men of sagacious and *cultivated* minds, practical enough to satisfy the most eminent solicitor,—this decision, so humiliating to the whole English bar, and fraught with so much public danger, in favour of a bequest so strongly marked with the gross and inherent vulgarity of the Saxon race, was set aside.”

Appeals from Scotland had, of course, reference only to civil rights: and in the decision of these, there will be found, in the long century and a half since the Union, the same sagacious and enlightened spirit. It is true that some of the Chancellors had not much sterling worth, and pass muster by virtue of a fictitious standard; but we excuse individual inefficiency in the presence of general merit. As things go, and acknowledging ourselves the creatures of the vulgar est prejudice, we must call it a fair catalogue of recognised notabilities, though not all of one coinage or of standard metal. The necessities of a minister often impose upon him hard conditions; and we are too much accustomed to this mixture of real and reputed worth, to quarrel with a distribution not altogether free.

The Pamphleteer of 1852 has dissected with merciless severity the judicial qualifications of the successive Chancellors. He files in grim array before us, Cowper, and Harcourt, and King, and Bathurst, and Wyndford; and to these we will add Truro. He thrashes them out, spreads them on the floor, gives the fan a turn, and they are all blown to the winds. But, on the other side, there are Hardwicke, and Thurlow, and Loughborough, and Mansfield (though not a Chancellor), and Eldon, and Lyndhurst, and Brougham, and Cottenham. It is a strange list. Heaven and earth contend for the mastery,—a mixture of learning and upholstery, of titles and genius.

But apart from the men, look at the result. It was not necessary for the argument of the Pamphleteer to pour obloquy on the institution. We agree with him, that a Scotch lawyer in the House of Lords would be a national good. But if we cannot get that, we prefer the alternative of maintaining things as they are, than accepting as final the judgments of any local court. Nothing can more illustrate the fact that, on the whole, the system has worked well, than the paucity of blunders, which all the industry and learning of the Pamphleteer could not increase. The most of these errors were committed by Lord Wyndford, who was made Chancellor because he had become unfit to preside over a Common Law court. Admitting these, ought we not to be grateful for such decisions as *Duntreath*, *Ascog*, *Horne v. Rennie*, and the long series of judgments on entails by Lord Eldon, and the last great triumph of common sense in the recent reversal of the judgments of both Divisions, as to the liability of a master for injury by one servant to another? Above them all stand out the two great judgments of Lord Brougham in *Don v. Lippman* and *Warrender*,—judgments which have re-

ceived the assent of jurists of all countries, and confer lustre not merely on their author, but on the science of the law.

There ought to be, and there ever has been, an appointed check for every power under the sun. There is the sword of Damocles for Louis Napoleon, revolution for the constitutional sovereign, mutiny for the chief, reform and the press for the House of Commons. The existence of the right of appeal, though there may never be one, is enough. Were it abolished, our local courts would want an ever-present stimulant to duty. The fact, that what a judge says in any part of Scotland as the ground of judgment, will be criticised and assailed at the bar of another tribunal, and the whole criticism recorded and published in reports of authority for the perpetual instruction of mankind,—is a fact which—every day of a judge's existence—preserves wakefulness, ensures patience, and keeps him to propriety and his duty. In Sydney Smith's time, his description was more accurate than it is now, or at least will be in November, when the pension clauses of the Sheriff Court Act come into operation, and when we hope to hear of the voluntary or compulsory resignations of a great number of incompetent local judges. "Nothing," says Sydney, "can be more unjust than to speak of judges as if they were of one standard, and one heart and head pattern. The great majority of judges, we have no doubt, are upright and pure, but some have been selected for flexible politics,—some are passionate,—some are in a hurry,—some are violent Churchmen,—some resemble ancient females,—some have the gout,—some are eighty years old,—some are blind, deaf, and have lost the power of smelling." Yet all the legislation of recent years gave to these local judges unreviewable jurisdiction over the poor. Who asked for the uncalled-for and pernicious abolition of the right of appeal from the sheriffs to the Circuit Courts? A more satisfactory tribunal, as worked by the later Justiciary Judges, did not exist in Scotland; and yet the country awoke one morning in the year 1853 to find it gone. Who agitated for the extinction of advocations from interlocutory judgments of the sheriffs on the grounds of *law* competent before 1853? and why allow appeals in small debt cases under L.12, and prohibit them in cases between L.12 and L.25? And no irritation is more bitter than that which the parties smart under in consequence of the working of the finality clauses in the Bankruptcy Act. In the very case in which it was desirable to have the review of a supreme judge (the election of a trustee),—the case where local prejudices and personal feelings most predominate, is the one selected for carefully omitting the wholesome control of the Supreme Court. No one desired the review of the whole court,—a private hearing in the Bill Chamber before an impartial man was only needed.

We cannot close these remarks without a word of thankfulness to Lord Cranworth. For this one act, he is entitled to immunity for many sins. He has established a precedent worthy of all praise, and we beg him, when occasion offers, to follow it up.

If you enter a court of law in Scotland, and listen to a debate, you will in all probability hear the argument uttered with great confidence, that "that plea is not in the record," and then the counsel proceed, like a set of pedants and grammarians, to torture a meaning out of words which their author never meant; and the case is lost, and justice defeated, and the villain triumphs through defect in pleading. Now, what are "pleas in law?" They are things tagged to a record which contain the facts on which judgment is to be delivered. They are of no use whatever to the case. They are traps to give the losing side a chance. They are strung together very often in a hurry,—very often when the head is very hot, the feet very cold, the brain very muddy, at or about two o'clock in the morning, when nature's sweet restorer is craving for its victim. It is only when, on the day of conflict, after the law is studied,—when the mind is clear, the blood warm, and the spirits high,—when the collision of opposing minds sifts the matter to the bottom,—that the real plea is seen. But the opportunity has fled. The plea is not upon the record, and the unhappy suitor is ruined.

Lord Cranworth had to deal with a case of this kind. In the case of *Blaikie v. Aberdeen Railway Co.* (vol. i., p. 470), this plea was put upon the record, "*Under the Companies' Clauses Act*, any such contract or agreement to which the pursuer Mr Thomas Blaikie was a party, while he remained a director of the company, was illegal, and cannot be enforced."

The plea was bad as laid on statute; it was well-founded if it had been laid on common law. But it was contended, that as common law was not pleaded, the Court could not decide upon it. This objection, however, was scoffed out of Court. "The object of pleading," said Lord Cranworth, "is to compel the litigant parties to state distinctly the *facts* on which their title to relief rests. *If this is done, the Court is bound to apply the law.*" It is good sense like this which has reconciled the Scottish people to the surrender of a jealous provincialism, and secured for the House of Lords their confidence and admiration.

Let us get rid of this vile pettifogger's plea by the aid of the Legislature, seeing that it can be stated on statutory authority. The lamented judge whom we have just lost had for it a thorough scorn. Long ago he said—"I never saw the use of pleas in law, and I have always thought them unnecessary."¹ And upon this opinion he consistently acted as a judge. The time has come for freeing us from the mockery, delusion, and snare, which puts an enormous power into the hands of a judge—to let in a plea for nothing, or a guinea, or all the costs, or not at all, according to the whim of the hour. Let us understand, too, once for all, if this be a plea in law—"In the circumstances condescended on, the pursuer is entitled to decree," or "the defender is entitled to absolvitor." If it be—and every summons comes into Court with

¹ 1st Rep. Law Com., App. p. 86, Ans. 31.

none other—a pleader would deserve a briefless existence for evermore, who appended to his pleadings a second plea. If this be one, it covers all Erskine and the Dictionary, the whole body of the statutes, and all the laws of ethics.

We have left ourselves scarcely any space to speak of the valuable labours of Mr Paton. With most laborious industry, he has prepared and published the decisions of the House of Lords for nearly a century. He has collected from all quarters the manuscript notes of the opinions delivered in the appellate tribunal, and has also printed the unreported judgments of the judges of the Court of Session, which were scattered over hundreds of session papers, and which, to the profession, were altogether unknown. A more valuable contribution has not been made to the law of Scotland for many years; and, reserving for some future occasion, a more detailed notice of Mr Paton's labours, we can now only give expression to the general feeling, that he has done to the profession of the law a great service.

Mr Paton has also published a handy and portable treatise on the Practice in Appeals, which we have no doubt will be found useful and convenient. It supplies the practical information which is wanting in Mr M'Queen's treatise on the Appellate Jurisdiction.

TITLES TO LAND BILL.

THE Bill introduced by the Lord Advocate to simplify the forms and diminish the expense of completing Titles to Land in Scotland, is so important, that, before proceeding to make such remarks as occur to us upon the clauses, we subjoin it *in extenso*.

Preamble.—Whereas it is expedient to simplify the Forms and diminish the Expense of completing Titles to Land in Scotland: be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:—

I. *Instruments of Sasine no longer necessary, but Conveyances may be recorded instead.*—That, from and after the passing of this Act, it shall not be necessary to expedite an Instrument of Sasine on any Conveyance for the Purpose of completing a Title to the Lands conveyed, but it shall be competent and sufficient, instead of expediting and recording such Instrument of Sasine, to record the Conveyance itself in the Register of Sasines applicable to the Lands therein contained; and the Conveyance, being so recorded in the Lifetime of the Person or Persons in whose favour it is made or granted, shall vest in him or them a Real Right in the Lands therein contained, and shall operate as fully and effectually, and have the same legal Force and Effect in all respects as if the Conveyance so recorded had been followed by an Instrument of Sasine duly expedite and recorded at the Date of recording the said Conveyance, according to the present Law and Practice, provided that the Conveyance so recorded shall operate as aforesaid only in favour of the Person or Persons by or on whose Behalf it is presented for Registration.

II. *Not necessary to record the whole Conveyance.*—In all Cases where a Conveyance of Lands shall be contained in a Deed granted for special Uses and Purposes, such as a Marriage Contract, Deed of Trust, or Deed of Settlement, it shall not be necessary to record the whole of such Deed, but it shall be suffi-

cient to expedite and record a Notarial Instrument setting forth generally the Nature of the Deed, and containing at length those Portions of the Deed by which the Lands are conveyed, by which Real Burdens, Conditions, or Limitations are imposed and by which the Nature of the Tenure is specified, or a Reddendo stipulated; and in all Cases where a Deed conveys different Lands to the same Person, or different Lands to different Persons respectively, or where it conveys Lands in favour of one Party in Liferent and another in Fee, or in favour of more Parties than One, either pro indiviso or in trust, it shall not be necessary for the Completion of the Title of One or more of such Persons to record the whole of such Deed, but it shall be competent to expedite and record a Notarial Instrument setting forth generally the Nature of the Deed, and containing at length the Part or Parts of the Deed by which the particular Lands are conveyed in which a Real Right is desired to be completed, and which specifies the Nature and Extent of the Right and Interest of the Party in whose Favour the Instrument is expedite, with the Real Burdens, Conditions, and Limitations, if any, the Nature of the Tenure, and the Reddendo; and such Notarial Instrument shall be in or as nearly as may be in the Form of Schedule (A.) here-to annexed.

III. *Instruments of Resignation ad remanentiam no longer necessary, but Conveyances in favour of Superior may be recorded instead.*—It shall not be necessary to expedite and record an Instrument of Resignation ad remanentiam on any Procuratory of Resignation ad remanentiam, or on any Conveyance containing a Clause of Resignation ad remanentiam, but it shall be sufficient to record in the appropriate Register of Sasines any Procuratory or Conveyance or a Notarial Instrument of Part thereof, as herein-before provided; and such Procuratory or Conveyance or such Notarial Instrument being so recorded shall have the same Effect as if an Instrument of Resignation ad remanentiam had been expedite on such Procuratory or Conveyance, and had been recorded in the Register of Sasines, according to the present Law and Practice.

IV. *Certain Clauses no longer necessary in Conveyances.*—It shall not be necessary to insert in any Conveyance a Clause of obligation to infeft, or a Precept or Warrant for infeftment: And all Conveyances shall be held to import a double Manner of holding, unless otherwise specially expressed; and a Clause of Resignation in any Conveyance shall be held to import a Resignation in favorem only, unless specially expressed to be a Resignation ad remanentiam.

V. *Crown Confirmations on Deeds confirmed.*—Where Lands are held of the Crown or Prince and Steward of Scotland, and a Confirmation of any Deed or Instrument recorded as aforesaid, comprehending such Lands, shall be desired, it shall be competent to apply to the Presenter of Signatures for a Confirmation to be written on the Deed or Instrument, instead of a Confirmation by Charter, and such Application shall be made in the same Manner in all respects as when a Charter of Confirmation is now applied for; and on the Presenter of Signatures being satisfied that the Party applying would be entitled to a Charter of Confirmation, he shall direct a Confirmation in the Form of Schedule (B.) to be written on the Deed or Instrument desired to be confirmed; and such Confirmation shall be signed by the Presenter of Signatures, and the Amount of the Fees exigible in the Office of the Presenter of Signatures, and also of the Duties and Casualties payable in Exchequer on account of the Lands contained in the Deed or Instrument confirmed, shall be marked on the Deed or Instrument confirmed, and certified by the Signatures of the Auditor of Exchequer and of the Presenter of Signatures; and on Payment of such Fees, Duties, and Casualties being made, the Deed or Instrument so confirmed shall be officially transmitted to the Director of Chancery, who, or his Deputy or Substitute, shall enter or cause to be entered in a Book to be kept for the Purpose, and intitled "The Register of Confirmations," the leading Name or Names of the Lands comprehended in the Deed or Instrument confirmed, and the Name of the Party in whose Favour the Confirmation is granted, and the Date of the Confirmation, and also the Name of the last en-

ered Vassal, and the Date of his Entry, and the Deed or Instrument so confirmed shall thereafter be delivered to the Party applying for Confirmation, or his Agent; and the Deed or Instrument so confirmed shall in all respects be as effectual as if a Charter of Confirmation of the Lands had been duly expedited according to the present Law and Practice, and shall be held to confirm the whole prior Deeds and Instruments necessary to be confirmed, in order to complete the Investiture of the Party obtaining the Confirmation.

VI. *Confirmation by Subject Superiors on the Deed confirmed.*—In all Cases in which a Confirmation by a Subject Superior of any Deed or Instrument so recorded shall be desired, it shall be competent for the Superior to confirm such Deed or Instrument by a Writing upon the Deed or Instrument in the Form and as nearly as may be in the Terms of Schedule (C.) hereto annexed, and the Confirmation so written shall be to all Intents and Purposes as effectual as if a Charter of Confirmation had been granted in the usual Form according to the present Law and Practice, and the Superior shall be bound so to confirm such Deed or Instrument, if required so to do: Provided always, that the Party requiring such Confirmation shall produce to the Superior the last Charter, Precept, or Writ of Acknowledgment of the Lands contained in the Deed or Instrument desired to be confirmed, and shall also at the same time pay or tender to the Superior such Duties or Casualties as he may be entitled to demand; and the Confirmation, written upon any Deed or Instrument so recorded, shall be held to confirm and shall to all Intents and Purposes operate as a Confirmation of the whole prior Deeds and Instruments necessary to be confirmed in order to complete the Investiture of the Party obtaining the Confirmation in the Lands contained in the Deed or Instrument so confirmed.

VII. *Writs of Acknowledgment in favour of Heirs.*—In all Cases where, according to the present Law and Practice, Precepts from Chancery or Precepts Clare constat are in use to be granted, it shall be competent and sufficient to grant a Writ of Acknowledgment in the Form and as nearly as may be in the Terms set forth in Schedule (D.) hereto annexed, where the Lands are held of the Crown or Prince and Steward of Scotland, and in the Form and as nearly as may be in the Terms set forth in schedule (E.) hereto annexed, where the Lands are held of a Subject Superior, and to record such Writ of Acknowledgment in the appropriate Register of Sasines; and such Writ being so recorded shall in all respects have the same Effect as if Sasine had been taken on a Precept by the Superior, and an Instrument of Sasine had been duly recorded according to the present Law and Practice; and all such Writs of Acknowledgment may be recorded in the appropriate Register of Sasines at any Time during the Lifetime of the Grantee, and Superiors shall be bound to grant such Writs of Acknowledgment, if required by the Heir so to do: Provided always, that the Heir shall produce the last Charter, Precept, or Writ of Acknowledgment applicable to the Lands in which his Ancestor died vest, and shall also at the same Time pay or tender to the Superior such Duties or Casualties as he may be entitled to demand; and where the Lands are held of the Crown or of a Prince and Steward of Scotland, or where the Heir is required by the Superior so to do, he shall also produce a Decree of General or of Special Service establishing his Right to succeed to the Lands; and where the Lands are held of the Crown or Prince and Steward of Scotland, the Application for such Writ of Acknowledgment shall be made in the same Manner in all respects as when a Precept from Chancery is now applied for, and such Writ of acknowledgment shall be recorded as Precepts are now in use to be recorded.

VIII. *Notarial Instrument by a general Dispositive.*—In all Cases where a Party vested with a Real Right in any Lands shall grant a general Disposition of his Lands, without specifying the Lands particularly, and whether such Disposition shall be by Deed mortis causa or inter vivos, it shall be competent to the Dispositive under such Disposition, or to any other Party who shall have acquired Right to such Disposition by Service, Assignment, Adjudication, or otherwise, instead of obtaining a Decree of Adjudication in Implement against

the Granter of such Disposition or his Heir, to expedite a Notarial Instrument in the Form and as nearly as may be in the Terms set forth in Schedule (F.) hereunto annexed ; and on such general Disposition along with such Notarial Instrument being duly recorded in the appropriate Register of Sasines, such general Disponsee or such other Party acquiring Right as aforesaid shall be held to be vested with a Real Right in the Lands specified in such Notarial Instrument, as if a Title had been completed by Adjudication in Implement according to the present Law and Practice: Provided always, that where such Notarial Instrument shall be expedite by a Party other than the original Disponsee under such Disposition, the Notarial Instrument shall set forth the Title or Series of Titles by which the Party in whose Favour the Instrument is expedite acquired Right to such general Disposition.

IX. Assignment to an unrecorded Conveyance.—It shall be competent to any Party, in right of an unrecorded Conveyance, to assign the Conveyance in the Form and as nearly as may be in the Terms of Schedule (G.), No. 1, and to record the Assignment or Assignations, in the event of there being successive Assignations, along with the Conveyance itself, in the appropriate Register of Sasines, and it shall be competent to write such Assignment or Assignations on the Conveyance itself in the Form and as nearly as may be in the Terms of the said Schedule (G.), No. 2 ; and on the Conveyance, along with the Assignment or Assignations, separate from or written upon the Conveyance, being so recorded, such Party shall be held to be vested with a Real Right in the Lands comprehended in the Conveyance, as if the Conveyance had been granted in favour of himself, and recorded in the Manner herein-before provided.

X. Notarial Instrument by a Party acquiring Right to an unrecorded Conveyance.—In all Cases where any Party shall have acquired Right by General Disposition, Service, Assignment, Adjudication, or otherwise, to an unrecorded Conveyance, hereby authorised to be recorded in the Register of Sasines, and which shall have been granted in favour of another Person, and which is in its Nature legally transmissible, it shall be competent to such Party to expedite a Notarial Instrument in the Form and as nearly as may be in the Terms of Schedule (H.), setting forth the Title or Series of Titles by which he acquired Right to the Conveyance, and to record the Conveyance along with the Notarial Instrument in the appropriate Register of Sasines, or where it is not desired to record the whole of the Conveyance, as herein-before provided, it shall be competent to expedite a Notarial Instrument in the Form and as nearly as may be in the Terms of the said Schedule (A.), setting forth generally the Nature of the Deed, and containing at length those Portions of the Deed by which the Lands comprehended in the Conveyance are conveyed, by which Real Burdens, Conditions, or Limitations are imposed, and by which the Nature of the Tenure is specified, and a Reddendo stipulated ; and also setting forth the Title or Series of Titles by which the Party acquired Right to the Conveyance, and to record such Notarial Instrument in the appropriate Register of Sasines ; and on the Conveyance, along with such Notarial Instrument in the Form of the said Schedule (H.), or on such Notarial Instrument in the Form of the said Schedule (A.), being so recorded, such Party shall be held to be vested with a Real Right in the Lands comprehended in such Conveyance, as if the Conveyance had been granted in favour of himself, and recorded in Manner herein-before provided.

XI. Particular Description of Lands contained in prior recorded Deeds may be referred to.—In all Cases where Lands have been particularly described in any prior Conveyance or Notarial Instrument, duly recorded in the appropriate Register of Sasines, or in any prior Instrument of Sasine so recorded, it shall not be necessary, in any subsequent Conveyance or Instrument of Sasine or Notarial Instrument, to repeat the particular Description of the Lands at length, but it shall be sufficient to refer to the particular Description contained in such prior Conveyance or Notarial Instrument, or Instrument of Sasine so recorded, in the Terms or as nearly as may be in the Terms set forth in

chedule (L.) hereto annexed; and the Reference so made shall be held to be equivalent to the full Insertion of the particular Description contained in such prior Conveyance or Instrument of Sasine or Notarial Instrument so recorded, and shall have the same Effect as if the particular Description had been inserted exactly as it is set forth in such prior Conveyance or Instrument of Sasine or Notarial Instrument.

XII. *Various Lands conveyed by the same Deed may be comprehended under one general Name.*—In all Cases where Two or more Parcels of Lands held under the same Superior are comprehended in the same Conveyance, it shall be competent to insert a Clause in such Conveyance declaring that the whole Lands conveyed, and therein particularly described, shall be designed and known in future by One general Name to be therein specified; and on such Conveyance containing such Clause being duly recorded in the General Register of Sasines, it shall be competent in all subsequent Conveyances, Instruments of Sasine, and Notarial Instruments to use the general Name specified in such Clause as the general Name of the several Lands declared by such Clause to be comprehended under it, and a Conveyance of such several Lands under the general Name so specified shall be as effectual in all respects as if the Conveyance contained a particular Description of each Parcel of such Lands: Provided always, that Reference be made in such Conveyances and Instruments of Sasine and Notarial Instruments to a prior recorded Conveyance or Instrument of Sasine in which such Clause and Description are contained; provided also, that it shall not be necessary in such Clause to comprehend under One general Name the whole Lands contained in the Conveyance in which such Clause is inserted, but that it shall be competent to comprehend certain Lands under One general Name, and certain other Lands under another general Name, being clearly specified what Lands are comprehended under each general Name; and such Clause of Reference shall be in the Terms or as nearly as may be in the Terms set forth in Schedule (K.) hereto annexed.

XIII. *Destinations in Entails may be referred to.*—In all Cases where Lands are or shall hereafter be held under a Deed of Entail it shall not be necessary to repeat the Destination contained in such Entail at length in the Conveyances, Instruments of Sasine, or Notarial Instruments necessary to transmit, renew, or complete a Title under such Entail, but it shall be sufficient to refer to the Destination as set forth at full Length in the Deed of Entail recorded in the Register of Tailzies, if the same shall have been so recorded, or as set forth at full Length in any Conveyance, Instrument of Sasine, or Notarial Instrument duly recorded in the appropriate Register of Sasines forming Part of the Progress of Title Deeds of the Lands comprehended under the said Entail, such Reference being made in the Terms or as nearly as may be in the Terms set forth in Schedule (L.) hereto annexed; and the Reference so made to such Destination shall be equivalent to the full Insertion thereof, and shall to all Intents and in all Questions whatever have the same legal Effect as if the Destination in the recorded Deed or Instrument referred to had been inserted at length, notwithstanding any Law or Practice to the contrary, or any Injunction to the contrary contained in such Deed of Entail, and notwithstanding any Enactments or Provisions to the contrary contained in any Act or Acts of Parliament now in force, all which are hereby repealed, so far as inconsistent herewith, but no farther; and in all Cases where a Deed of Entail contains an express Clause authorising Registration of the Deed in the Register of Tailzies it shall not be necessary to insert Clauses of Prohibition against Alienation, contracting Debt, and altering the Order of Succession, but such Clause of Registration shall have in every respect the same Operation and Effect as if such Clauses of Prohibition had been inserted according to the present Law and Practice, and duly fenced with irritant and resolute Clauses.

XIV. *Recording of Conveyances in the Register of Sasines authorised.*—All Conveyances and Notarial Instruments hereby authorised to be recorded in the Register of Sasines may be recorded therein at any Time in the same Man-

ner as Instruments of Sasine are therein recorded, and the Keepers of such Register are hereby authorised and required to record the same accordingly, and all such Conveyances and Instruments shall in Competition be preferable according to the Date of the Registration thereof; and the Certificate of Registration on such Conveyance shall specify the Party by or on behalf of whom it was presented for Registration; and Extracts of all such Conveyances and Instruments so recorded shall make faith in all Cases in like Manner as the recorded Conveyances and Instruments themselves, except where any such Conveyance or Instrument so recorded shall be offered to be improved.

XV. *Present Forms of Conveyances may be used.*—Nothing contained in this Act shall prevent the Constitution, Transmission, or Completion of Land Rights by the Forms in use prior to the passing of this Act.

XVI. *Mode of completing Title by a Judicial Factor.*—In all Cases where a Judicial Factor or other Judicial Manager shall be authorised to complete a Title to any Lands, it shall be competent for him to expedite a Notarial Instrument setting forth his Appointment, and the Warrant granted for completing such Title, and specifying the Lands to which such Title is to be completed, and the Title by which such Lands are at the Time held, in the Form and as nearly as may be in the Terms of Schedule (M.) hereto annexed, and to record such Notarial Instrument in the appropriate Register of Sasines; and on such Notarial Instrument being so recorded such Judicial Factor or Manager shall be held to be vested with a Real Right in the Lands specified in such Notarial Instrument, to the same Effect in all respects as if a Title had been completed in his Person with a double Manner of holding according to the existing Law and Practice.

XVII. *Mode of completing Title by a Trustee in Sequestration.*—It shall be competent to a Trustee on a sequestrated Estate, in order to complete a Title to the Lands belonging to the Bankrupt, to expedite a Notarial Instrument setting forth the Act and Warrant of Confirmation in his Favour, and specifying the Lands belonging to the Bankrupt to which a Title is to be completed, and the Title by which such Lands are held by the Bankrupt, in the Form and as nearly as may be in the Terms set forth in Schedule (N.) hereto annexed, and to record such Notarial Instrument in the appropriate Register of Sasines, and on such Notarial Instrument being so recorded such Trustee shall be held to be vested with a Real Right in the Lands specified in such Notarial Instrument, to the same Effect in all respects as if a Title had been completed in his Person with a double Manner of holding according to the existing Law and Practice.

XVIII. *Mode of relinquishing Superiorities.*—In order to facilitate the extinguishing of Midsuperiorities not defeasible by the Vassal it shall be competent to any Subject Superior, whether himself entered with his Superior or not, to relinquish his Right of Superiority in favour of his immediate Vassal, by granting a Deed of Relinquishment in the Form and as nearly as may be in the Terms of Schedule (O.) hereto annexed; and on such Deed of Relinquishment being accepted by the Vassal by an Acceptance written on such Deed in the Terms set forth in the Schedule (P.) hereto annexed, and being followed by a Writ of Investiture by the Oversuperior as herein-after provided, also written upon such Deed of Relinquishment, and on such Deed with the Acceptance and Writ of Investiture written thereon being thereafter recorded in the appropriate Register of Sasines, the Superiority so relinquished shall be held to be extinguished, and the Vassal and his Successors in the Lands shall hold the same as immediate Vassals of the Oversuperior by the Tenure and for the Reddendo by and for which such relinquished Superiority was held, and the Vassal and his forefathers shall be entitled to apply for an Entry to such Oversuperior accordingly as his immediate Superior; and such Relinquishment by a Superior who shall not have completed his Title to the Superiority relinquished shall not infer a passive Representation on his Part, nor any Liability for the Debts of the Person last infert therein, beyond the Price, if any, which he may receive for such Relinquishment.

XIX. Investiture by Oversuperior.—On the Application of the Vassal in the relinquished Superiority, and on Production by him of such Deed of Relinquishment, and Acceptance thereof, and on his paying or tendering such Duties and Casualties as may be exigible by the Oversuperior, the Oversuperior shall be bound to receive the Vassal as his immediate Vassal by Writ of Investiture in the Form as near as may be of the Schedule (Q.) to this Act annexed, to be written on the Deed of Relinquishment, and the Tenendas and Reddendo contained in the Title Deeds of the relinquished Superiority shall be inserted in room of those contained in the former Investiture held under the relinquished Superiority; and where the Lands are held of the Crown or of the Prince and Steward of Scotland such Writ of Investiture shall be obtained from the Presenter of Signatures in the same Manner as is herein-before directed in regard to Confirmations written on the Deeds confirmed, and the Deed of Relinquishment, with the Acceptance and Writ of Investiture thereon, shall be officially transmitted to the Director of Chancery and recorded in the same Manner in which Crown Charters are now in use to be recorded, and shall thereafter be delivered to the Vassal or his Agent on Payment of the same Fees as are now payable for recording a Charter in Chancery: And the Investiture completed upon such Relinquishment of the Superiority shall be as effectual as if the Granter of the Deed of Relinquishment had completed his Title to the Superiority, and had thereafter conveyed the same to the Vassal, and the latter, after having completed his Titles under the Oversuperior, had resigned ad remanentiam in his own Hands: Provided always, that the Investiture so completed shall not in any respect extend the Rights or Interests of such Oversuperior, and that he shall be entitled to no more than the Duties and Casualties, taxed or untaxed, to which he would have been entitled if the Granter of the Deed of Relinquishment had remained his Vassal.

XX. Application of Price of entailed Superiorities.—Where the Right of Superiority so relinquished shall form Part of an Estate held under a Deed of strict Entail, such Relinquishment shall not operate as a Contravention of such Entail, anything contained in the Deed of Entail or any Act of Parliament notwithstanding; and the Price agreed to be paid for such Superiority so relinquished, if any, shall be consigned by the Vassal in one of the chartered Banks, in Name of the Accountant of the Court of Session, and shall be applicable and applied in such and the like Manner and to such and the like Purposes as Purchase Money or Compensation coming to Parties having limited Interests is made applicable, under the Lands Clauses Consolidation (Scotland) Act, 1845, or under the Act of the Eleventh and Twelfth Victoria, Chapter Thirty-six, intituled "An Act for the Amendment of the Law of Entail in Scotland;" and for that Purpose it shall be competent to the Heir of Entail in possession to present a Petition to the Court of Session, praying to have the Price so applied, and such Petition shall set forth the Names, Designations, and Places of Abode of those Heirs of Entail whose Consents would be required to the Execution of an Instrument of Disentail; and on such Petition being served on such Parties, and being intimated in the Minute Book and on the Walls, in common form, it shall be competent for the Court to direct the Price to be applied to such of the said Purposes as may appear to them to be most expedient: Provided always, that where the Sums agreed to be paid for all the Superiorities which form Part of an entailed Estate shall not exceed the Sum of *Two Hundred Pounds* such Sums shall belong to the Heir in possession, and the Court shall direct such Sums to be paid to him.

XXI. Price of Superiorities of entailed Lands may be charged on the entailed Estate.—Where the Lands of which the Superiority is so relinquished shall be held by the Vassal under a Deed of strict Entail, the Vassal in such Lands shall be entitled and he is hereby authorised to grant a Bond and Disposition in Security over the entailed Estate for the full Amount of the Price paid for the relinquished Superiority, and his granting such Bond and Disposition in Security shall not operate as a Contravention of such Entail, anything contained in the

Deed of Entail or any Act of Parliament notwithstanding: Provided always, that such Bond and Disposition shall be granted with the Consent of those Heirs of Entail whose Consents would be required to the Execution of an Instrument of Disentail of the Lands, or, provided a Judicial Warrant is obtained for granting such Bond and Disposition, by obtaining a Decree of the Court of Session pronounced on a Petition by the Heir of Entail in possession praying for such Warrant; and the Proceedings under such Petition shall be the same or as nearly as may be the same as the Proceedings under a Petition to charge an entailed Estate with Provisions to younger Children, as authorised by the Act of the Eleventh and Twelfth Victoria, Chapter Thirty-six, intituled "An Act for the Amendment of the Law of Entail in Scotland:" Provided always, that it shall not be necessary that such Petition should be publicly advertised in any Newspaper, but that Service and Intimation only shall be made in common Form.

XXII. *Interpretation Clause.*—The following Words in this Act and in the Schedule annexed to this Act shall have the several Meanings hereby assigned to them, unless there be something in the Subject or Context repugnant to such Construction; that is to say, the Word "Deed" and the Word "Conveyance" shall extend to and include original Charters, Charters of Resignation, of Adjudication, or of Sale, Dispositions, Bonds and Dispositions in Security, Bonds of Annuity or of Annual Rent, or other Heritable Bonds, Feu Contracts, Contracts of Ground Annual, Decrees of Adjudication either in Implement or for Debt, Decrees of Sale or of Special Service, Precepts from Chancery, Precepts of Clare Constat, Writs of Acknowledgment, Contracts of Excambion, or other Deed by which Lands are conveyed, or Rights in Lands, either absolute or redeemable or in Security, are constituted or conveyed; the Word "Lands" shall extend to and include Lands, Houses, Teinds, Fishings, Patronages, Mills, Mines, Minerals, and in general all heritable Subjects, Securities, and Rights; the Word "Instrument" shall extend to and include all Notarial Instruments authorised by this Act, and also Instruments of Sasine; the Words "Notarial Instruments" shall include only the Notarial Instruments authorised by this Act.

XXIII. *Recorded Instruments not to be challenged on the Ground of Erasures.*—The Act of the Sixth and Seventh of His late Majesty King William the Fourth, Chapter Thirty-three, intituled "An Act to amend and regulate the Law of Scotland as to Erasures in Instruments of Sasine and of Resignation ad remanentiam," shall extend and be applicable to Notarial Instruments authorised by this Act, but no further.

XXIV. *Diligence against apparent Heirs.*—Actions of Constitution and Adjudication against an Apparent Heir on account of his Ancestor's Debt or Obligation, for the Purpose of attaching the Ancestor's Heritable Estate, may be combined in One Summons, whether the Heir renounce the Succession or not: And Actions of Constitution, and Actions of Constitution and Adjudication, against an Apparent Heir, on account of his Ancestor's Debt or Obligation, for the Purpose of attaching the Ancestor's Heritable Estate, and Actions of Adjudication against such Heir on account of his own Debt or Obligation, for the Purpose of attaching such Estate, may be insisted in at any Time after the Lapse of Six Months from the Date of his becoming Apparent Heir, any Law or Practice to the contrary notwithstanding: And in all such Cases a Decree of Adjudication shall be held equivalent to and shall have the legal Operation and Effect of a Conveyance with a double Manner of holding from the Ancestor whose Estate is adjudged in favour of the Adjudger.

XXV. *Deeds and Instruments may be partly written and partly printed or lithographed.*—All Deeds and Instruments whatever, mentioned or not mentioned in this Act, having a Testing Clause, may be partly written and partly printed or lithographed: Provided always, that in the Testing Clause the Date, and the Names and Designations of the Witnesses, and the Number of the Pages of the Deed or Instrument, and the Name and Designation of the Writer

of the written Portions of the Body of the Deed or Instrument and of the written Portions of the Testing Clause, shall be expressed at length in Writing; and such Deeds and Instruments shall be valid and effectual in the same Manner as if they had been wholly in Writing, according to the present Law and Practice.

XXVI. This Act shall not extend or apply to the Titles of Lands held by Burgh Tenure.

XXVII. *Title of Act.*—This Act may be cited for all Purposes as “The Completion of Titles (Scotland) Act, 1858.”

SCHEDULES REFERRED TO IN THE FOREGOING ACT.

SCHEDULE (A.)

Notarial Instrument in favour of Disponsee or his Assignee, etc.

At there was by [or on behalf of] A.B. of Z., Esquire, presented to me, Notary Public subscribing, a Disposition [or other Deed, or an Extract of a Deed, as the Case may be], granted by C.D. of Y., Esquire, and bearing Date [insert the Date], by which Disposition the said C.D. sold, alienated, and disposed to the said A.B. [or gave, granted, and disposed, or otherwise, as the Case may be, to the said A.B.] [or to E.F.], and his Heirs and Assignees [insert the Destination, if any], heritably and irredeemably [or redeemably, or in Liferent, or otherwise, as the Case may be], all and whole [here insert the Description of the Subjects conveyed, and state the Reddendo; and if the Deed be granted under the Burden of a Real Lien or Servitude, or any other Incumbrance, Condition, or Qualification of the Right, or under Redemption, add here], “but always under the Burden of a Real Lien,” etc. [as the Case may be]. [If the Party expeding the Instrument be other than the original Disponsee, add] as also there was presented to me [here specify the Title or Series of Titles by which the party acquired Right], whereupon this Instrument is taken by the said A.B. in the Hands of G.H. [insert Name and Designation of Notary Public], in the terms of the Act Victoria, intitled “An Act to simplify the Forms and diminish the Expense of completing Titles to Land in Scotland.” In witness whereof [here insert a Testing Clause in usual Form].

(Signed) G.H.,
Notary Public.

I.K. Witness.

L.M. Witness.

SCHEDULE (B.)

Crown Confirmation on Deed confirmed.

Victoria, etc. We, immediate lawful Superiors of the Lands contained in this Deed [or Decree, or Instrument, or otherwise, as the Case may be], confirm the same in favour of C.D., but subject always to and in so far as consistent with the [here specify the last or other Charter, or Precept, or Writ of Acknowledgment], and our own Rights. Given at Edinburgh, the Day of in the Year

Signed by the Presenter of Signatures.

Note.—When the Confirmation is to be granted by or on behalf of the Prince or Steward of Scotland, it will be granted in Name of the Prince or Steward of Scotland, without adding His Highness's other Titles.

SCHEDULE (C.)

Confirmation by a Subject Superior on Deed confirmed.

1, A.B., lawful Superior of the Lands contained in this Deed [or Decree, or

Instrument, or otherwise, as the Case may be], confirm the same in favour of C.D., but subject always to and in so far as consistent with my own Rights. In witness whereof [*here insert the usual Testing Clause*].

SCHEDULE (D.)

Crown Writ of Acknowledgment.

Victoria, etc. [*adopt the present Form of a Crown precept down to the Warrant for Infestment, and in place of such Warrant add*], therefore we do hereby acknowledge C.D. to be the Heir of E.F. in the said Lands. Given at Edinburgh, the day of in the Year .

*Signed by the Director of Chancery
or his Depute or Substitute.*

Note.—When the Writ is to be granted by or on behalf of the Prince or Steward of Scotland, it will run in Name of the Prince or Steward of Scotland, without adding His Highness's other Titles, or will run in Name of Her Majesty as his Administrator.

SCHEDULE (E.)

Writ of Acknowledgment by a Subject Superior.

Because by authentic Instrument and Documents it clearly appears that the deceased C.D. died last vest and seised as of Fee in all and whole [*describe the Lands*], in virtue of [*specify Title of C.D.*], and that E.F. is [*describe Relationship*], therefore I, A.B., immediate lawful Superior of the Lands and others above written, hereby acknowledge the said E.F. to be the nearest and lawful Heir of the said C.D. in the said Lands, to be holden of me [*insert Tenandas and Reddendo Clauses, and specify the Conditions and Burdens of the Right, if any, and add*], saving and reserving always my own Rights. In witness whereof [*here insert Testing Clause in the usual Form*].

SCHEDULE (F.)

Notarial Instrument in favour of a general Donee, or his Assignee, etc.

At there was by [or on behalf of] A.B. of Z., presented to me, Notary Public subscribing, a Disposition [or other Deed or Instrument], recorded in the [*specify Register of Sasins and Date of recording*], by which recorded Disposition [or other Deed or Instrument] C.D. of Y. was vest in all and whole [*here describe the Lands*]; as also there was presented to me a general Disposition [or other Deed, or an Extract of a Deed], granted by the said C.D., and bearing Date [*here insert Date*], by which general Disposition the said C.D. sold, alienated, and disposed [or gave, granted, and disposed, or otherwise as the Case may be] to the said A.B., and his Heirs and Assignees [or otherwise, as the Case may be], heritably and irredeemably [or redeemably, or in Liferent, or otherwise, as the Case may be], all and whole his Heritable Estate of which he was [or might die] possessed of. [*If the Deed be granted under any Real Burden or Condition or Qualification, add here*], "but always under the Burden of the Real Lien, etc.;" and if the Deed be granted in trust, or for certain Purposes, add, "but always in trust or for the Uses and Purposes mentioned in said Deed." If the Party expeding the Instrument be other than the original Donee, add, "as also there was presented to me" [*here specify the Title or Series of Titles by which the Party acquired Right*]. If, also, the general Conveyance be a mortis causa Deed, add, "and sufficient Evidence was given to me that the said C.D. was deceased." Whereupon this Instrument is taken by the said A.B., in the Hands of G.H., etc., as in Schedule (A.)

SCHEDULE (G.)

No. 1.

Assignment of an Unrecorded Conveyance.

I, *A.B.*, in consideration of, *etc.* [or otherwise, as the Case may be], hereby assign to *C.D.*, and his Heirs and Assignees [or otherwise as the Case may be], the Disposition [or other Deed, specifying the Nature of the Deed], granted by *E.F.*, dated *etc.*, by which he conveyed the Lands of *X.*, as therein described, to me [or otherwise, as the Case may be, specifying the connecting Title]. In witness whereof [here insert a Testing Clause in the usual Form].

No. 2.

Assignment of an Unrecorded Conveyance written upon the Conveyance.

I, *A.B.*, in consideration of, *etc.* [or otherwise, as the Case may be], hereby assign to *C.D.*, and his Heirs and Assignees [or otherwise, as the Case may be], the above Disposition of the Lands of *X.*, as therein described, granted in my Favour [or otherwise, as the Case may be, specifying the connecting Title]. In witness whereof [here insert a Testing Clause in the usual Form].

SCHEDULE (H.)

Notarial Instrument in favour of an Assignee to an Unrecorded Conveyance.

At there was by [or on behalf of] *A.B.*, of *Z.*, Esquire, presented to me, Notary Public subscribing, a Disposition [or other Deed, as the Case may be, specifying the nature of the Deed], granted by *C.D.*, of *Y.*, Esquire, and bearing date [insert Date], by which Disposition the said *C.D.* conveyed to *E.F.* the Lands of *X.*, as therein described, and which Disposition is to be recorded in the Register of Sasines along with this Instrument; as also there was presented to me [here specify the Title or Series of Titles by which *A.B.* acquired right], whereupon this Instrument is taken by the said *A.B.* in the Lands of *G.H.* [insert name and Designation of Notary Public], in the Terms of the Act intitled "An Act to simplify the Form and diminish the Expense of completing Titles to Land in Scotland." In witness whereof [here insert a Testing Clause in usual Form].

I. K., Witness.

(Signed)

G. H.,

L. M., Witness.

Notary Public.

SCHEDULE (I.)

Clause of Reference to prior Descriptions of Lands.

"as particularly described in the Disposition [or other Deed, as the Case may be] granted by *C.D.*, in favour of, and bearing Date [here insert Date], and recorded in the [specify the Register of Sasines] on the Day of in the Year " [or "as particularly described in the Instrument of Sasine, recorded, *etc.*"] [If Part only of Lands is conveyed, describe such Part, and add, "being Part of the Lands particularly described, *etc.*" or thus, "as particularly described, *etc.*, with the Exception of," and describe the Part excepted.]

SCHEDULE (K.)

Clause of Reference to Conveyance, containing new Designation of Lands.

"as particularly described in the Disposition [or other Deed, as the Case may be], granted by *C.D.*, and bearing Date [here insert Date], and recorded in the [specify the Register of Sasines] on the Day of in the Year , and in which the Lands herein contained are declared to be known and designed by the said Name of [here insert Name], [or "as particularly described in the Instrument of Sasine, recorded, *etc.*, and in which the Lands herein contained are declared, *etc.*"] [If Part only of Lands is conveyed, then as in Schedule (I.)]

SCHEDULE (L.)

Clause of Reference to Destinations in Entails.

[After inserting such Part of the Destination as may be thought necessary, add]
 "and to the other Heirs specified and contained in a Disposition and Deed of
 Entail of the said Lands executed by the deceased E.F., bearing Date the
 Day of _____ in the Year _____
 and recorded in the Register of Tailzies on the _____ Day of _____
 in the Year _____," [or "in the said Disposition
 and Deed of Entail dated and recorded as aforesaid," or "in a Deed [or Instru-
 ment] recorded [specify Register of Sasines] upon the _____ Day of _____
 in the Year _____"].

SCHEDULE (M.)

Notarial Instrument in favour of Judicial Factor.

At _____ there was, by [or on behalf of] A.B., presented
 to me, Notary Public subscribing, an Extract Decree bearing Date [insert Date]
 by which the said A.B. was appointed Judicial Factor on the Estate of C.D. [or
 otherwise, as the Case may be]; and also an Interlocutor dated [insert Date, and
 specify the Warrant for completing Title]; as also there was presented to me a
 Disposition [or other Deed or Instrument] [insert Date] recorded in the [specify
 Register of Sasine and Date of recording], by which [etc., as in Schedule (A.)
 specifying the Title or Series of Titles by which the Lands are held]. Whereupon
 this Instrument [etc., as in Schedule (A.)].

SCHEDULE (N.)

Notarial Instrument in favour of a Trustee in a Sequestration.

At _____ there was, by [or on behalf of] A.B., presented
 to me, Notary Public subscribing, an Extract Act and Warrant of Confirmation
 in his Favour as Trustee on the sequestrated Estate of C.D., dated [insert
 Date]; as also there was presented to me a Disposition [or other Deed or In-
 strument] [insert Date] recorded in the [specify Register and Date of recording],
 by which [etc., as in Schedule (A.) specifying the Title or Series of Titles by which
 the Bankrupt held the Lands]. Whereupon this Instrument [etc., as in Schedule
 (A.)].

SCHEDULE (O.)

Deed of Relinquishment of Superiority.

I, A.B., immediate lawful Superior of all and whole [here describe the Lands],
 absolutely and gratuitously [or in consideration of the Sum of _____ Pounds
 paid or consigned], hereby relinquish and renounce my Right of Superiority of
 the said Lands in favour of C.D., my immediate Vassal, and his Successors
 therein, and declare that the said Lands shall no longer be held of me as
 Superior, but shall be held of my immediate lawful Superior in all time to
 come. In witness whereof [here insert usual Testing Clause].

SCHEDULE (P.)

Acceptance by Vassal written on Deed of Relinquishment.

I, C.D., the immediate Vassal in the Lands described in this Deed, accept
 the Relinquishment of the Superiority of the said Lands. In witness whereof
 [here insert usual Testing Clause].

SCHEDULE (Q.)

Writ of Investiture written on Deed of Relinquishment.

I, A.B., lawful Superior of the Lands contained in this Deed, accept and re-

ve *C.D.*, and his Heirs and Successors whomsoever, [*or otherwise, according to the Destination contained in the Title to the Lands,*] in place of *E.F.*, and his Heirs and Successors, in virtue of the above Deed of Relinquishment, and acceptance thereof. To be held the said Lands by the said *C.D.* and his Heirs and Successors [*specify the Tenandas and Reddendo contained in the Titles of the relinquished Tenancy*].

If a bill or an Act of Parliament can ever be said to be interesting, it is when it affects the income and professional prospects of the lawyer. And in this view the members of the legal profession will prize the foregoing measure more eagerly, more carefully, and with closer attention, than they would bestow upon the last production of the most fascinating writer of the day. To those who remember the state of public opinion in Scotland not a great many years back, and especially the state of feeling and opinion among lawyers as to legal changes, it is a circumstance not less gratifying than it is remarkable, to see a Bill of this description laid upon the table of the House of Commons by the first law officer of a Conservative Administration. Still more satisfactory is the reception it has received from the parties who will be chiefly affected by its operation. The profession, uninfluenced by selfish considerations or party feelings, are unanimous in its favour. The bill is only one of a great series of measures of law reform which the present Ministry have introduced, with an anxious desire to lose not a single day; and their readiness and zeal, while it reflects honour upon themselves, is a proof of the ripeness of public and professional opinion upon the subjects with which they deal. Before proceeding to discuss the details of the bill, we would direct attention to the clearness of the phraseology, and the generally superior manner in which it has been drawn.

The first clause provides for the abolition of the Instrument of Sasine—a measure of reform which we have strongly advocated, and which, accordingly, we are glad now to have the prospect of seeing carried into effect. The practicability of the step has long been demonstrated by the successful and satisfactory working of the Lands Clauses Act, by which this improvement was virtually enacted several years ago for the benefit of railway companies; and every one must have been satisfied, after the introduction of such an innovation, that the time would very soon come when the instrument would no longer be considered indispensable. It was by no means essential for feudal purposes, because the vassal was seised in his possession, not by the instrument, but by the ceremony of which the instrument merely preserved an account. The ceremony itself having been dispensed with by previous Acts of Parliament, the only excuse for retaining the instrument was removed; and to have preserved it longer in the mutilated form in which it has existed for several years, would neither have been fair towards the public, nor advisable for the profession. The conveyance thus becomes the important deed in conveyancing; and before we inquire how it is to receive the

effect of the instrument of sasine, it may be proper to note the changes which, by other clauses of the bill, it is proposed to make upon the present form.

The Dispositive Clause.—An important alteration is proposed to be made upon this clause by enacting (sec. 2), that in all cases where lands have been particularly described in any prior conveyance, duly recorded (under the provisions of the bill) in the appropriate Register of Sasines, or in any prior instrument of sasine so recorded, *it shall not be necessary to repeat the particular description of the lands at length*, but it shall be sufficient to refer to the particular description contained in such prior conveyance or instrument of sasine, thus: “as particularly described in the disposition granted by C. D., and bearing date 1st July 1858, and recorded in the General Register of Sasines at Edinburgh on the 2d day of July 1858,” or “as particularly described in the instrument of sasine in favour of C. D., recorded in the General Register of Sasines at Edinburgh on the 30th day of June 1858.” In the schedule (I.) giving these forms, there is no blank for inserting the name of the party in whose favour the instrument of sasine has been expedited, at the place where we have filled up the words “in favour of C. D.,” and, to correspond with the clause of the bill, there ought also to be added to the schedule the third alternative, [or, as particularly described in the notarial instrument recorded, etc.] When statutory schedules are given, they cannot be too accurate. If part only of the lands is conveyed, it will be sufficient to describe the part, and then add, “being part of the lands particularly described,” etc., as above, or the lands may be disposed, in the first place, “as particularly described,” etc., and then the part reserved introduced by the words “with the exception of,” followed by the particular description of the excepted part. The reference made in this manner to the description in previously recorded conveyances or instruments of sasine, is to be held to be equivalent to the full insertion of the particular description contained in these recorded deeds, and to have the same effect as if the particular description had been inserted exactly as it is set forth in such recorded documents. We observe an error of some magnitude in clause 11, which proposes to enact these important changes. From the structure of the clause, it is clearly intended that the particular description may be referred to, whether it is inserted in a recorded conveyance, instrument of sasine, or *notarial instrument*; the latter part being to the following effect:—“And the reference so made shall be held to be equivalent to the full insertion of the particular description contained in such prior conveyance or instrument of sasine, or *notarial instrument* so recorded, and shall have the same effect as if the particular description had been inserted exactly as it is set forth in such prior conveyance or instrument of sasine, or *notarial instrument*,” but in the first part of the clause, the words, “or *notarial instrument*,” are twice omitted.

A very important modification of the dispositive clause is also authorised by the 12th section of the bill, relating likewise to the description of the lands. In all cases where two or more parcels of lands *held under the same superior* are comprehended in the same conveyance, it shall be competent to insert a clause in the conveyance, declaring that the whole lands conveyed, and therein particularly described, shall be designed and known in future by one general name to be therein specified; and after such general name having entered the record, it will be sufficient to use the general name in subsequent transmissions by referring to the recorded deed in which the particular description applicable to the general name will be found. Both of these provisions are objected to, but we believe the innovation to be beneficial and salutary.

Obligation to Infest.—This clause is, by the abolition of the same, no longer necessary.

The Precept or Warrant for Infestment.—For the same reason this clause is also dispensed with.

The effect of these changes will be better appreciated by giving the form of a disposition such as it may be under the new form, although, as will afterwards be shown, the alterations are not limited to dispositions.

New Form of Disposition.—“*I, A. B., merchant in Edinburgh, heritable proprietor of the lands and others hereby disposed, in consideration of the sum of one thousand pounds instantly paid to me by C. D., writer here, as the price thereof, of which sum the said C. D. is hereby discharged, do sell, alienate, and dispoise to the said C. D., and his heirs and assignees whomsoever, all and whole that tenement, No. 209, George Street, Edinburgh, as particularly described in the disposition granted by E. F., residing in Corstorphine, in favour of the said A. B., and bearing date 12th August 1858, and recorded in the General Register of Sasines at Edinburgh on the 13th day of August in the year 1858, together with all right, title, and interest which I or my predecessors and authors had, have, or can any way claim or pretend hereto, in all time coming; with entry at the term of Whitsunday 1858: And I resign the said lands and others for new infestment; and I assign the writs, and have delivered the same according to inventory; and I assign the rents; and I bind myself to free and relieve the said C. D. and his foresaids of all feu-duties, casualties, and public burdens; and I grant warrandice; and I consent to registration hereof for preservation and execution. In witness whereof;*” etc.

It will thus be seen that the form of the disposition is now cut down to the average length of a transfer of stock, and the most devoted admirer of brevity must be satisfied. When we add, that the form may, by clause 25 (which, indeed, extends “to all deeds and instruments whatever, mentioned or not mentioned in this Act, having a testing clause”), be partly written and partly printed or lithographed, it must be apparent that mercantile ideas are completely in the ascendant. The only provisions with respect to partly

printed or lithographed deeds are, that in the testing clause the date, and the names and designations of the witnesses and the number of pages of the deed or instrument, and the name and designation of the writer of the written portions of the body of the deed or instrument, and of the written portions of the testing clause, shall be expressed at length in writing,—provisions which, although not formally expressed in the bill, must necessarily have been adopted, unless each deed had been wholly printed or lithographed from the draft.

The extensive and important alterations are not confined to the disposition as it is explained by the interpretation clause, that the words, “deed,” and “conveyance,” which are used in the clauses to which we have referred, “shall extend to and include original charters, charters of resignation, of adjudication, or of sale, dispositions, bonds and dispositions in security, bonds of annuity, or of annual-rent, or other heritable bonds, feu-contracts, contracts of ground-annual, decrees of adjudication either in implement or for debt, decrees of sale or of special service, precepts from Chancery, precepts of *clare constat*, writs of acknowledgment, contracts of excambion, or other deed by which lands are conveyed, or rights in lands, either absolute or redeemable or in security, are constituted or conveyed.”

The conveyance having been executed, it will be unnecessary to expedite and record any instrument of sasine; but instead, the conveyance itself will be recorded in the Register of Sasines applicable to the lands conveyed, and clause 1 provides that “the conveyance being so recorded *in the lifetime of the person or persons in whose favour it is made or granted*, shall vest in him or them a real right in the lands therein contained, and shall operate as fully and effectually, and have the same legal force and effect in all respects, as if the conveyance so recorded had been followed by an instrument of sasine duly expedite and recorded at the date of recording the said conveyance.” There is a provision, that the conveyance so recorded shall operate in this manner only in favour of the person or persons by or on whose behalf it is presented for registration. By clause 14, the innovation of recording conveyances and notarial instruments in the Register of Sasines is authorised, and the keepers are required to record them accordingly. The conveyances and instruments are to be preferable according to the date of registration, and extracts to make faith in all cases in like manner as the recorded conveyances and instruments themselves, except where anything shall be offered to be improved.

When the conveyance is unrecorded, it may (by clause 9) pass from hand to hand almost like a bill of exchange, and certainly as freely as a debenture bond. The party in right of the unrecorded conveyance may assign it, either by a separate short deed, in the form of a schedule attached to the Act, or by an indorsation upon the conveyance itself, in the form of another schedule, which is also appended. A conveyance may in this manner be for a considerable period “in the circle;” and when the holder considers it desirable

to transform his personal into a real right, he has only to record the conveyance along with the assignation or assignations, and on being so recorded, "the party shall be held to be vested with a real right in the lands comprehended in the conveyance, as if the conveyance had been granted in favour of himself and recorded in the manner" already described. There is also a provision (clause 10) by which a party who has acquired right to an unrecorded conveyance by assignation may expedite a notarial instrument, and on the instrument and conveyance being recorded the party is to be vested with a real right in the lands comprehended in the conveyance, as if the conveyance had been granted in favour of himself and recorded. There may be circumstances in which such a mode might be resorted to with advantage, where the title has become complicated, and the forms prescribed in clause 9 have not been strictly followed.

As lands are very frequently conveyed in trust settlements and similar deeds, containing a great variety of provisions, which would tend to overburden the record if the deed were inserted at length, a very useful provision is contemplated by clause 2. In all such cases it shall be sufficient to expedite and record a notarial instrument setting forth generally the nature of the deed, and containing at length those portions only by which the lands are conveyed, by which real burdens, conditions, or limitations are imposed, and by which the nature of the tenure is specified, or a reddendo stipulated. Perhaps this provision imposing the burden of a separate deed might be dispensed with, by authorising the insertion in the deed of a clause pointing out the portions to be recorded; and we understand some such method is in contemplation.

A notarial instrument may also be expedite and recorded in place of the deed, where different lands are conveyed to the same person, or different lands to different persons, or where lands are conveyed to one person in life and another in fee, or in favour of more parties than one, either *pro indiviso* or in trust. In all these cases, by the method of notarial instrument, each party may have his own right made real, without being impeded with the rights, or burdened with the expense more properly falling upon others.

A party having obtained his conveyance, and recorded it in due form, the next point for consideration is entry with the superior. And with this class of titles the bill very properly deals stringently. Both where the Crown and a subject are superiors, it is provided that any deed or instrument recorded according to the provisions of the bill may be confirmed by a writing upon the deed or instrument in the form of a schedule annexed. The schedule is as short and precise as could possibly be desired. The confirmation so written is to be, to all intents and purposes, as effectual as if a charter of confirmation had been granted in the usual form. The superior is to be bound to confirm in this manner, if required so to do; but the party must produce the last charter, precept, or writ of acknowledgment of the lands, and at the same time pay or tender the feu-duties and casual-

ties exigible. The confirmation is to be held to confirm the whole prior deeds and instruments necessary to be confirmed in order to complete the investiture of the party in the lands, thus removing fruitful sources of perplexity and annoyance. In room of precepts from Chancery and precepts of *clare constat*, a writ of acknowledgment is substituted, and the recording of the writ of acknowledgment is to have the effect of sasine upon the former deeds. It would be advisable to add to this clause that the granting of all such writs shall be equivalent to confirmation. The charter of resignation is untouched, except where its form is altered by the provisions applicable to the "conveyance," which, by the interpretation clause, includes the charter of resignation. The Faculty of Advocates, in their report on the bill, propose that resignation should be completed in the same mode as confirmation by a writing on the deed; and the propriety of such a proposal is so obvious, that we doubt not the Lord Advocate will accede to it.

The mode of consolidating the property and superiority is proposed to be simplified by clause 3, which provides that it shall not be necessary to expedite and record an instrument of resignation *ad remanentiam*, but it shall be sufficient to record the procuratory or conveyance containing a clause of resignation *ad remanentiam*.

Clauses 18 and 19 deal with the very important question of the extinction of mid-superiorities. They do not go deeper, however, than merely to provide for a form of title by which the object can be accomplished, and entirely leave untouched any means by which either the superior or the vassal can force on an extinction. It was wise to refrain from any attempt of this kind in a bill which professes only to deal with titles; and we question whether public opinion in Scotland is ripe for any general measure of conversion, at any specific rate of purchase or otherwise. The forms seem admirably adapted to the purpose in view. The mid-superior is to grant a deed of relinquishment, the vassal is to sign an acceptance written on the deed, and the over-superior then grants a writ of investiture, to be written on the deed of relinquishment, which, being recorded along with the prior deeds, constitutes the party in whose favour the deeds are granted the vassal of the over-superior. The over-superior is bound to grant the requisite writ of investiture when asked, upon the vassal tendering the duties and casualties exigible by him.

The mode in which *general disponees*, *judicial factors*, and *trustees on sequestrated estates* may make up their titles, is provided for by clauses 8, 16, and 17. The mode proposed is by notarial instrument, in the form of schedules annexed to the bill. This will save many complicated proceedings which are necessary at present, such as, in the case of a general disponee, the process of adjudication in implement. Advantage has also been taken of the passage of this Act to insert a clause for the purpose of reducing the *annus deliberandi*, as proposed by Mr Dunlop in a separate bill (which, however,

was objectionable, and was ultimately withdrawn), at the beginning of the session. It is now proposed that actions of constitution and adjudication against an apparent heir on account of his ancestor's debt or obligation, for the purpose of attaching the ancestor's heritable estate, may be combined in one summons, whether the heir renounce the succession or not; and all the competent actions for attaching the ancestor's heritable estate, either for the debt of the ancestor or the heir, may be insisted in at any time after the lapse of six months from the date of the apparenecy. A decree of adjudication in such cases is to be equivalent to a conveyance with a double manner of holding in favour of the adjudger from the ancestor whose estate is adjudged.

Clause 13 provides for a reference to destinations of entails in the same manner as is proposed with reference to the particular description of lands; while clauses 20 and 21 deal with the application of the price of entailed superiorities, and empowering the price of superiorities of entailed lands to be charged on the estate.

We understand that a very important suggestion has been made by the Committee of the Faculty of Advocates, that an additional clause should be inserted, declaring that a conveyance shall be valid though neither containing the magic word "dispone," nor words which, in the present state of the law, could be held to be words of *presenti* conveyance, provided the deed clearly express the meaning of the granter to convey. We have no doubt the Lord Advocate will be induced to make this valuable addition to the Act, the present absurdly technical rules are only fitted to entrap the wary, and are no protection whatever.

A more important suggestion still has been made by the Committee of the Society of Solicitors before the Supreme Courts. They point out very properly that much as the present bill, if passed into an Act, will accomplish, the transfer of land will nevertheless be very expensive, if the conveyancer has to examine a forty years' progress of titles, and the seller or borrower to exhibit a forty years' search of incumbrances. They ask, whether the prescriptive period might not be at once limited to twenty years? We cannot at present enter into the question, but we hope the law officers of the Crown will not overlook the proposition.

It would greatly facilitate the working of the Act if the proper authorities would at once issue a statement of the stamp duties which they consider applicable to the various new deeds which are proposed.

The late Lord Justice Clerk Hope.

SINCE our last publication, a great and remarkable man has passed away. The Lord Justice Clerk Hope, the President of the Second Division of the Court, struck down by one of those sudden visitations, which startle us into the recollection of our precarious existence, has been summoned, almost in an instant, from the scene of his earthly labours, at a time when health and years seemed still to promise him a long career of useful and honourable exertion. The suddenness of the stroke, the elevated position and marked character of the judge whose course has been thus calamitously arrested,—all combined to give to the event a more than ordinary interest and significance, and to produce a deep and solemn effect on all who had been brought within the sphere of his acquaintance or his influence. It was difficult for those who, for years, had been familiar with his appearance in Court, as the very type of physical and mental vigour, to realize the truth, that that imposing presence had been seen among them for the last time, and that that active and energetic heart was for ever still.

A sentence from a manly, generous, and well-written article in the *Scotsman*, embodies the events of his life, so far as his professional position is concerned:—"He was born in Edinburgh in 1794: was called to the bar in 1816: was Solicitor-General from 1823 to 1830: and was Dean of the Faculty of Advocates from 1830 to 1841: He was appointed Lord Justice Clerk in that year, on the translation of the Right Honourable David Boyle from the chair of the Lord Justice Clerk to that of Lord President."

These few dates in themselves indicate the career of no common man. High birth and connections might have advanced a man of moderate abilities into a respectable position at the bar, and perseverance might have maintained him there; but *he* must have given token of no ordinary acquirements and strength of character, to whom the office of Solicitor General was entrusted at the age of twenty-nine; and *he* must have worthily filled that high position, on whom, when removed from power by the accident of political change, the Faculty of Advocates unanimously resolved to confer the highest distinction which it was in their power to bestow, at the early age of thirty-six. And when the chair of the Second Division of the Court became vacant, by the return of the Conservative party to power, and the consequent removal of Mr Boyle to the presidency of the Court of Session, it was at once felt, not only that the appointment would naturally be offered to Mr Hope, but that it belonged to him by the legitimate title of being the fittest man whom the Parliament House could then suggest to support the dignity and discharge the important duties of the office. These, as our readers are probably aware, involved the virtual presidency of the Criminal Court, in addition to the civil duties of the Court of

Session; and over both branches of the law, it was acknowledged that the successor of Mr Boyle had acquired the undisputed mastery.

If we look back on his professional career, and endeavour to discover the secret of that success which placed him at so early a period on a level with the great leaders of the bar, and ultimately advanced him to the highest honours which the profession could bestow, it is easily to be found in one or two leading characteristics of his mind, which must have existed from the first, and which the struggles of after life had tended only to develop and confirm. Foremost among these was the *intensity* of his mind; he could do nothing listlessly or languidly: whatever he did, whether in great things or small, he did it with his whole heart, soul, and strength. He was restless till he had got to the root of the whole matter. Whether it was to resolve a feudal difficulty, to sift and harmonise conflicting decisions, or to reduce to order a chaotic proof, the same concentrated attention was bestowed on the subject, till its minutest details had become part and parcel of his mind, and so deeply engraven on it, as to be scarcely capable of being obliterated from his memory. To this intensity of will and keenness of perception, was superadded the strongest practical sense in dealing with cases either with judges or with juries. He might sometimes be needlessly minute in details, but he never wasted a moment on the mere garniture of the case, or failed to discern distinctively, and to press home with irresistible energy its strong and salient points. With reference to the charge of prolixity which had been applied to his speeches or his written arguments, it may be observed, that his experience had taught him that there could be no greater mistake in dealing with juries or law, in addressing a court, than to present the subject in too close or condensed a form. Neither courts nor juries can deal with essences. With juries in particular, there must be exposition, expansion, exhibition of the subject in various lights;—in plain terms, there must be repetition, if they are to be brought to the full perception of the points at issue, or of the strength of the case addressed to them; and many of Mr Hope's triumphs, in difficult and complicated cases before juries, we are convinced, were owing to this very amplitude and reduplication of statement, which, in an oratorical point of view, was injurious to their merit. The truth is, he thought of no other oratory than that which was to procure the verdict—"quocumque modo rem;" and, in fact, he attached much less importance to the speech than to the previous preparation and thorough arrangement and exposition of the case; while some, even of his eminent rivals, were chiefly intent on their addresses to the jury, and perhaps neglected in that view the less showy, but the weightier matters of the law. Mr Hope's main attention was directed to strengthening the outworks of his own case, and accumulating the materials with which he hoped to demolish that of the enemy. Every fragment that could be wrought into the fabric of his case, was gathered up from the most distant sources, and incorporated

with it. Not a loop-hole in his own position was left unguarded; and even when his opponents had, as they thought, successfully overthrown his outer line of defence, it was only to find, as they often did, that they had to encounter a second and more formidable barrier within. His object was, so to prepare his own case as to render surprise impossible: to bring together every available material that could be brought to bear on the camp of his opponent; and confident in the weight and force of the artillery which he wielded, he was comparatively indifferent to the way in which it might be delivered. But even as oratorical addresses—if oratory is to be viewed as synonymous with persuasion, and its value to be tested by the touchstone of success—Mr Hope's speeches to juries were precisely those which were suited to the audience. Always exhibiting a thorough grasp and command of the question, embodying his views in language forcible and intelligible, sometimes most lucid, appropriate, and persuasive; and singularly sagacious in the adaptation of his topics or illustrations to the minds of those he was addressing, many of his speeches to juries, appear to us to be models worthy of study and analysis, by his successors; from the combination of breadth of view with detail, the forecast with which every possible aspect of the case had been foreseen and provided for, and the manly common sense which commends them to men of that measure of mind who compose the majority of juries. Juries are generally very ordinary men: and the majority of cases which come before juries, are very ordinary cases. For one case which appeals to the passions, there must always be twenty which deal with the common business and interests of life, and to which eloquence, in its more imaginative form, is inapplicable. And in this wide range of cases, embracing all the ordinary transactions between man and man, Mr Hope displayed a rare tact in fathoming the views and securing the confidence and sympathy of juries, by his sagacity, rectitude of feeling, and thorough identification with his case.

Mr Hope's written arguments present mostly the same characteristics, though in these the defect of redundancy perhaps appears more prominently. Their learning is frequently great; they exhaust the subject invariably, but the argument does not always arrange itself artistically; the high pressure of employment, under which they were written, was fatal to condensation, and sometimes to arrangement; he had not time, in fact, to write a short paper. On the whole, they exhibit him to less advantage than his oral pleadings, though they bear on their face the same impress of power, and appear wonderful with reference to the rapidity with which they must have been composed.

Probably his nature was from the first confident and self-reliant, and his precocious experience had strengthened that feeling. Contending, when a mere youth, against veteran rivals, he had found in himself a new combination of qualities, which made him even then, on the whole, their equal. Accordingly, he never felt a doubt about

his resources, or that he could be equal to the occasion, whatever might be the demand on his powers. He has been heard to say, that no case in which he was engaged, had ever cost him a sleepless night. He could lay down an intricate case, and retire for the few hours which he allowed himself for sleep, confident that in the morning all its perplexities would have unravelled themselves, or would speedily yield to the steady pressure of a penetrating mind. Like others who have limited, to its smallest amount, the time for rest, his sleep was almost instantaneous; it could be counted on for certainty; anxiety or mental emotion was never permitted to disturb it; it seemed to partake of that intensity which characterized his waking mind.

The amount of labour undergone by Mr Hope, when at the bar, would appear incredible to those who had not witnessed it. Up to 1825, the most of the work in the Court of Session was substantially performed through written pleadings; and of these no one prepared more than Mr Hope. The task begun in the morning was prolonged far into the night. Strange to say, however, amidst this absorbing and engrossing profession, he found time to read almost every work of fiction, travels, and divinity, that appeared. As has been said of another eminent man, he seemed at once to tear out the heart of every volume he perused. We remember hearing him say, that even in his busiest days of practice, he had once sat up all night to read a now-forgotten work by the author of "Tremaine," entitled, "De Vere," and had finished the four volumes at a sitting.

This mental labour would have been impossible for any but a frame of more than ordinary physical strength. This Mr Hope possessed in an eminent degree. His corporeal strength and activity were great; his figure tall, commanding, capable of enduring great fatigue; uniting the appearance of strength with that unmistakable look of high-breeding which adhered to him through life, even when years had added some heaviness to his form, and his buoyant step had become less elastic and firm. His early devotion to his profession left him neither time nor inclination for field sports of any kind, but in his more youthful days, his love for walking, when he could indulge it, was almost as insatiable as his love of mental labour. The hard-working lawyer, who, even in his country residence, had been toiling in the morning over cases and memorials, might be found a few hours later on the summit of Benlomond or toiling up the sides of Ben-y-glo. Thus each pursuit reacted on the other; the intensity of his labours gave an exquisite keenness to his enjoyment of these intervals of not inactive leisure; the relief which these imparted renewed vigour both to body and mind. Let this lesson not be forgotten by the student of his profession: without the active habits which he thus kept up through life, the Lord Justice Clerk would never have achieved what he did. There was something eminently healthy and simple in his love of country sights and sounds, and of the grander forms of nature. He had not a pictur-

esque eye, in the ordinary sense of the word ; he could not discern whether the features in a landscape were adapted to the purposes of art or not ; but the aspect of nature, in its greater features, never failed to move him ; and we have often witnessed, almost with surprise, the effect produced on him by the sight of some mountain range of noble hills, the view of a vast plain seen from a mountain top, or the solitary shores of an inland Highland sea. He loved nature well, in short, though he could not use the technical language of admiration.

As Dean of the Faculty of Advocates, an office which he held from 1830 to 1841, his popularity was great. He cultivated the acquaintance and friendship of the young men of the bar, and obtained in no common degree, their confidence and attachment in return. He was always prompt to give encouragement and advice to merit, wherever he recognised it ; and not a few of those whom, in after life, have risen to a high position at the bar, are proud to ascribe to his influence and recommendation the origin of their success. We recollect no Dean of Faculty, with the exception of the distinguished personage who now combines that office with the functions of Lord Advocate, who was felt to be so entirely identified with the bar during his tenure of office.

In 1841 he became Lord Justice Clerk : and it is true that, for a time at least, he was less popular in this capacity than he had been as Dean of Faculty. Every one of course did justice to the eminent ability, the entire impartiality and conscientious labour with which he discharged the duties of the chair ; but the very anxiety which he felt that every point of every case should be exhausted,—that nothing which the Court might desire for its own satisfaction to know, should be kept back, exposed him to the remark, that pleadings came to be unnecessarily lengthened, or repeated before him, that the expenses of cases were increased by additional printing ; and that the conduct of agents or counsel, in the preparation of causes, was occasionally made the subject of comments, which were sometimes unfounded, and at other times, somewhat unmeasured in their expression. If there was some foundation in the outset for this accusation, it appears to us to have been altogether inapplicable to the later years of his judicial career ; and nowhere, so far as our experience goes, were counsel received with more courtesy, or more indulgence and encouragement given to any promise of merit, on the part of junior counsel, than in the Second Division of the Court. Passing from these matters, which are rather of form than substance, and coming to the more important consideration,—How were the judicial functions of the Lord Justice Clerk performed during his tenure of office from 1841 to 1858 ? we do not hesitate to say, that both in the Criminal and the Civil Court, he proved himself to be a great lawyer and distinguished judge. In the Criminal Court we know of one only who can take rank beside him : and his judgments on matters of law and evidence, embracing some of the most

delicate and difficult questions that have occurred in Jurisprudence, we are confident, will be acknowledged with gratitude by every student of law, as models of legal learning, happily guided and tempered by good sense. In the conduct of the civil business of the Court, the powerful nature of his mind was equally obvious. Many of his judicial opinions are *treatises* that exhaust the subject. On the subject of prescription, or intricate questions of vesting, of life-rent and fee, and of entail, he has reviewed, in the most comprehensive and able manner, the apparent conflict of previous decisions, and done much to advance these difficult questions to a solution. To the law of evidence he has made the most important contributions; for, if there was any one department of law in which more than another he was peculiarly accomplished, it was in the almost intuitive perception of what fell within the province of legal evidence and what did not. Every opinion he gave was eminently original and suggestive; the product of his own anxious and independent thought, but aided by all that research and industry could borrow from the labours of his predecessors.

On the character of the Lord Justice Clerk in private life, it is not our province to enter. As public journalists, we have to deal with him only as a lawyer; we leave to others the duty of recording his domestic virtues, and of paying to his memory the tribute so justly due to him as a noble-hearted, generous, and loving man.

Review.

Parliament.—In the proceedings of Parliament during the past month, Scotch affairs have occupied an unusual prominence. Not only has considerable progress been made with the many admirable measures introduced by the Lord Advocate, but even a large portion of the time of the House of Commons has been ungrudgingly given to various speculative matters relating to Scotland of little immediate importance. One of these was the proposal to transfer the political duties of the Lord Advocate to a Scotch Under-Secretary of State. This is one of the propositions of the Scottish Rights Association, which, perhaps, of all the absurd proposals of that short-lived body, made the nearest approach to common sense. It is a favourite scheme of certain of the Scotch Radical members, who would thereby be eligible for the great prize which is now open only to lawyers. The motion, however, was but feebly supported; and the House expressed so decided an opinion against it, that we presume it may be considered as dead and buried, for this generation at all events. The case of the mover was simply this,—that the duties of the office of Lord Advocate were so laborious and multiform, that they *ought* not to be efficiently discharged.

No attempt whatever was made to show either, that in point of fact they *are* inefficiently discharged ; or (which is of more consequence) that the appointment of an Under-Secretary for Scotland would be any improvement on the existing system. It is perfectly true, that the Lord Advocate combines in his own person functions of a very important and varied character—" he is Secretary of State, Grand Jury, Coroner's Inquest, Privy Council, Commander of the Forces"—in short, he is everything. But we are a quiet, contented population, easily governed. The local bodies manage local, burgh, and county affairs ; matters of imperial concern necessarily fall to be disposed of by the cabinet of the day ;—what properly form the national affairs of this kingdom, entirely and exclusively relate to Scotch law—the church and the law being the sole relics of our lost nationality. Keeping out of view the important functions of public prosecutor (which in practice almost wholly devolve on the Solicitor-General and the Advocates Depute), the only duties within the scope of the Lord Advocate's office are legislation and patronage. Now, almost every Scotch bill is a law bill ; a large portion of the Scotch patronage of the Home Office relates to offices of a legal nature, and filled up on the advice of the Lord Advocate, who is practically conversant with the profession. Both these matters, then, can only safely be entrusted to a trained and experienced lawyer, such as the Lord Advocate invariably is. We quite concur in the remark of Mr Bouverie (who, as an English lawyer, knows all about it), that " it would be a very inferior substitute for the learning, diligence, and ability brought to bear on the various questions connected with Scotland, to provide at haphazard some member of that House who would be much less able to deal with those questions than the Lord Advocate invariably was." He might have added with equal truth, that the great grievance of Scotland in the Imperial Parliament, is not the absence of a special Secretary of State, but the small number of lawyers which she can afford to send to the House of Commons. It is notorious that the Scotch members—though for the most part honest, sensible men—know nothing whatever about the questions on which they are called to legislate. What, for example, does an honest country laird, a merchant, or a manufacturer, know of such questions as those which form the subjects of the Titles to Land Bill, or the Executors Bill ? Of what use are they in questions of that kind ? And yet to these, and such as these, Scotch legislation is now wholly confined. Happily, while the country has been so ill represented, there have always been at the head of every Administration a series of public men, who were deemed worthy of this compliment by the Chancellor of the Exchequer :—

" I have had some experience in this House, and I must say my experience leads me to this conviction, that of all public offices none have been sustained during the last twenty years with such continuous ability and sound intelligence as the office of Lord Advocate of Scotland. (Hear, hear.) I do not

remember the period in which it has been filled by a man of inferior ability, or in which the service of the State, so far as that office is concerned, has not been efficiently conducted. I do not remember a period in which it has not been represented in all its attributes by men entitled to respect, and often to admiration." (Hear, hear.)

Obviously the member for Montrose must seek another field for the exercise of his energies than the administration of Scotch affairs.

The Lord Advocate's Legislation.—The Executors Bill has passed through committee; and the Titles to Land Bill is making rapid progress to the final stages. The latter measure, which is printed and commented on in another part of this month's publication, has received a most favourable reception from the legal public. To the credit of the profession be it said, it has nowhere been considered in a selfish spirit. Whatever changes in practice it may effect, no opinion has been expressed save one of cordial and general approval. The most commendable anxiety has been manifested to second the efforts of the Lord Advocate, by practical suggestions in matters of detail. The professional feeling on the subject may be gathered from a paragraph in the report of the Solicitors before the Supreme Courts :—

"The changes which it is the object of this bill to effect are numerous and important. They can scarcely fail, for a time at least, to diminish materially the emoluments which conveyancers and notaries-public have hitherto derived from their profession. But the Council are of opinion that the attempt to simplify the form and diminish the expense of completing titles to land in Scotland, is one which ought to receive the support of this Society. However much the provisions of the bill may at first affect the professional emoluments of individual members, it is thought that the interests of the public and of the profession are not antagonistic, and that if it be a beneficial measure for the public, it will not in the end be detrimental to the legal profession."

Taken in connection with the Universities Bill, this measure has secured for the Lord Advocate as great a success in public life as he has obtained at the bar. At an unusually early period, he now takes the second prize open to Scotch lawyers, with the unanimous approval and the best wishes of all ranks of the profession. There is no man living to whom it is more justly due; but we cannot avoid indulging our regret that it will occasion his withdrawal from a sphere which he was so peculiarly fitted to adorn. His premature retirement from Parliament leaves a void it is quite impossible to fill. It would have been an object of national importance if he had been in the House of Commons ten years earlier or ten years longer. But events have been otherwise ordered. And, meantime, it is matter of congratulation that the presidency of the Second Division of the Court, and the chief charge of the criminal justice of the kingdom, are committed to one so admirably qualified for the exalted station. His appointment will

at once restore the popularity of the Second Division; and being still in the prime of life, he will ably second the praiseworthy efforts of the Lord President to clear off the accumulation of business, of which the Rolls are being rapidly disencumbered.

Official Changes.—Providence is always upon the side of the Tories. On the death of Lord President Hope, Mr Boyle took his place, and the old President's son became Justice Clerk; and Rutherford resumed his stuff gown, and his practice at the bar. Eleven years passed, and the short-lived Conservative Government came into power, and Lord Colonsay became the chief; and Lord Rutherford again had to bear the disappointments of ambition. After seven long years of arduous and faithful service as Lord Advocate, during which he has made seven judges of the Court of Session, Mr Moncreiff has to drink the bitter cup of disappointment, and the Lord Advocate of a day assumes the purple. There is here plenty of room for moralising, were this other than a practical Journal for the record of passing events. A special providence certainly watches over the Tories.

Mr Inglis becomes Lord Justice Clerk of Scotland, and Mr David Mure, Solicitor-General. This latter promotion calls for the obvious remark, that, admitting Mr Mure's merits, it is effected at the expense of Mr Graham Bell, Mr Dundas, Mr Moir, and Mr Patton,—all of whom are Mr Mure's seniors, and have deserved well of their party. Political ingratitude, however, is the order of the day, and the springs of professional promotion are absolutely inscrutable to the uninitiated public. One office remains, which is independent of party politics, or the influence of political associations. By the elevation of Mr Inglis, the office of Dean of the Faculty of Advocates has become vacant, and we grieve to say, that in reference to it, the name of a respected and respectable man has been used in a manner which, we have no doubt, he himself will regret. The Scotch bar, at the present moment, possesses one man, who, to the usual professional qualifications of an accomplished lawyer, has united the happier and rarer quality of a successful orator, in the most fastidious of all assemblies. Mr Moncreiff has preserved in the House of Commons the prestige of the Scottish bar, by a success rare in modern times, not merely in the purely local subjects on which he was *ex officio* an authority, but upon matters of national importance. No doubt the election to the office of Dean of the Faculty of Advocates has been often made to turn upon political and personal antipathies; but the era for this has now gone by; and this is not an occasion in which political rancour should be revived.

The Registrarship of Sasines.—Among the matters mooted in Parliament during the month, was the recent appointment to the office of Keeper of the Register of Sasines. This last official act of Mr

Moncreiff has given rise to a good deal of criticism of a kind that might be more justly applied to the system of promotion in public offices, than to the merits of this particular appointment. Indeed, the principle of having one head of a department to perform the work, and another to receive the emoluments, is so firmly rooted in our whole administrative system, that we are almost tempted to doubt the sincerity of public men, when they object to the appointment of Mr Brodie on the ground that his office is a sinecure. The public are certainly indebted to the Scotch members for their zeal in ferreting out the few honorary offices that are open to Scotchmen; but we have not seen any evidence of a disposition on the part of their English brethren to contribute their share to such labours of economy.

We have heard a story of an English cabinet minister, before the time of the Reform Bill, who, on meeting a friend after a general election, remarked with an air of perplexity, "I have just been returned for the burgh of Wigtown,—Where is Wigtown?" and there are registrarships in Chancery, and lucrative situations about Doctor's Commons, filled at this day by relatives of eminent judicial and arch-episcopal personages, who would be equally at a loss to indicate the whereabouts of the establishments over which they are supposed to preside. There are also commissioners in important departments of the Revenue who reside chiefly on the Continent, receiving their two or three thousand a-year in circular notes from a London banker. If the House of Commons is prepared to record a resolution that no sinecure office that may become vacant in future should be filled up without the consent of Parliament previously obtained, we will give it credit for earnestness in the matter; but we confess, we have little sympathy with piecemeal clipping at official salaries. We are aware that there are specialties in the present case. By a Treasury minute of old standing, it had been provided that the next vacancy should not be filled up without previous inquiry. When the vacancy did occur, Mr Brodie, as Crown agent, made a report at the request of the Home Office, in which he recommended that the office should be continued, and the salary of the Keeper increased, in respect of certain additional duties that would devolve upon his deputy! It is but fair to say, that there is every reason for supposing that Mr Brodie had no intention at that time of asking the office for himself. Still, a report affirming the expediency of filling up a sinecure office by a gentleman who, in the opinion of the late Government, was himself the person best qualified to fill it, will hardly be accepted as conclusive or satisfactory; and unless some duties commensurate with the remuneration of the Keeper are to be imposed upon him by the new Registration Bill, which, we understand, is in preparation, it would be best, perhaps, for that gentleman to put an end to the discussion by resigning. Such an act would be a graceful concession to public feeling; and who knows but it might shame the Marquis of Dalhousie into a similar surrender?

Although possessed of a private fortune which places him far above the necessity of accepting public money, that distinguished official seems to be as strongly impressed as Sydney Smith was, in his controversy with the Dissenters, with the absurdity of being *reasoned* out of L.1200 a-year. The only official act, so far as we can learn, that the Marquis has ever performed as Lord Clerk Register, was to don his official robes and sit for his portrait!

The Liabilities of Bank Directors.—The fall of another banking corporation, under circumstances which will render an inquiry by the Court necessary, lends additional interest to the question, how far the directors of a public company may with safety to themselves fabricate reports and declare false and fictitious dividends. A decision on this important point has just been pronounced by the Second Division, which, we believe, will give entire satisfaction to the public. The case is *Tulloch's Executors v. Davidson, etc.*, the representatives of a Mr Davidson who was a director of the notorious Aberdeen Bank. The pursuers, in the first place, claim recovery of the price of certain shares, and the calls paid thereon, on the ground that they were purchased by Dr Tulloch "in consequence of false and fraudulent representations made by the late Mr Davidson as a director." Secondly and alternatively, the summons concludes for the amount of the loss and damage sustained by Dr Tulloch as a shareholder, "in consequence of the culpable and fraudulent violations of duty as a director, on the part of Mr Davidson, in misapplying the funds of the company, and otherwise." The action differs in some respects from the case against Mr Davidson and other directors of the bank, raised by Leslie's representatives, and finally disposed of by the Court on 19th June 1856. The grounds of the present action are shortly these: Mr Davidson, it is said, from the year 1828 downwards, designedly abused his power and violated his duty as a director, fraudulently and illegally to promote the private interests of his friends and connections. In particular, he made or allowed to be made, without security, advances out of the funds of the bank to five parties, at a time when he knew them to be unable to meet debts already due, and when he was aware or had sufficient reason to believe that the advances so made would not be recovered. The amount of the sums so advanced was, at the close of 1833, upwards of L.295,000, when, moreover, other losses had been incurred to the extent of L.56,552, all which, though well known to Mr Davidson and his co-directors, were fraudulently concealed from the shareholders. In point of fact, the above losses were actually written off as such in the books of the bank, with the knowledge of Mr Davidson and his co-directors, prior to 1834; but nevertheless, in reports to the shareholders, at their annual meetings in April 1828 and 1834, and intervening years, Mr Davidson and the other directors falsely represented the bank as in prosperous circumstances, and as having realised large profits—justifying the payment

dividends ranging from 6 to 7 per cent., with a bonus in 1828 2 per cent.—while it was perfectly well known to the directors, at no profits whatever had been made during any of the years mentioned. Dr Tulloch, relying on the truth of the statements contained in the annual reports and the dividends declared, purchased stock in 1834, by which time it was known to the directors that the nominal capital of the company had been swept away. The defence put forward was, that as the shares had not been purchased by any of the directors, but were bought from shareholders in the market, at the market value, there was no privity of contract between the transferees and directors out of which legal liability could be inferred. The Court has refused to give effect to this plea; to recognise the monstrous proposition, that the directors of a joint stock company, the shares of which are bought and sold on the Stock Exchange, may with impunity resort to any fraudulent devices to raise the market value of the stock. Lord Cowan, who delivered the judgment of the Court, observed, “The market price of the shares comes to depend directly on the reports from time to time circulated by the directors among their constituents. The fraudulent representation and concealment of the directors cannot therefore be viewed as matters with which the public and intending purchasers of stock have no concern. It is, in truth, on them that the acts are specially intended to operate, and they are the only parties deceived by the fraud. If then the wrong-doer is legally answerable for his wrong, it is but a legitimate sequence, that the party suffering from the wrong must have right to demand redress for the consequences.” These views will meet with the concurrence of the profession. It is in every respect a most just judgment; and will, doubtless, have the best possible effect in putting an end to the disgraceful doings lately disclosed.

Reparation—Master and Servant.—The question, whether a master is liable for the injury done to a servant by a fellow-servant, which has given rise to so much discussion in the courts of Scotland, has at length been determined, in the House of Lords, in favour of the master. In England it was first raised and decided in the year 1837, in the case of *Priestly v. Fowler*, 3 Meason and Welsby; and the law laid down by Lord Abinger in that case was afterwards recognised in the English courts, in the cases of *Hutchison v. The York, Newcastle, and Berwick Railway Company*, 1850—*Vigmore v. Jay*, 1850, 19 Law Journal, Exchequer cases, p. 300; and *Wigget v. Fox*, 1856, Law Times, vol. 26, p. 309. In *Hutchison's* case Baron Alderson stated the law in the following terms:—

“Where two servants are jointly engaged in a common service, and one is injured by the carelessness or unskilfulness of the other, the servant injured has no claim against the master,—they have both engaged in a common service, the duties of which impose a certain risk upon each of them, and in case of negligence upon the part of the other, the party injured knows that the negligence is that of his fellow-servant, and not that of his master. He knew

when he was engaged in the service that he was exposed to the risk of injury, not only from his own want of skill or care, but on the part of his own fellow-servant also, and he must be supposed to have contracted on the terms that, as between himself and master, he would run that risk. The principle is, that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the risks of the service; and this includes the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both."

None of the cases above referred to was ever carried to the House of Lords, but the principle was understood to be settled in the law of England.

The rule thus established in England does not appear to have been noticed in the courts of Scotland until the year 1851. In the case of *Sword v. Cameron* in 1839, when a servant claimed reparation from his master for injury sustained by him in consequence of the carelessness of a fellow-servant in firing a blast in a quarry, the master's liability seems to have been assumed. The point was raised for the first time in the case of *Paterson v. The Monkland Iron and Steel Company*, 1st July 1851, but not decided. Shortly afterwards a case occurred, in which it was argued and deliberately determined by the Second Division of the Court, in the case of *Rankin or Neilson v. Dixon*, 31st January 1852. This was an action of damages for the death of the pursuer's husband, a workman in the defender's employment. The death was occasioned by the negligence of another servant of the defender's, in not taking proper measures to fasten a machine, called a crab, at the mouth of their coal-pit. The Lord Justice-Clerk said the master's primary obligation was to attend to, and provide for, the safety of his men; he was bound to see that the acts done by his servants were properly performed, and their misconduct was his. He adds—

"The servant then, in the contract of service in Scotland, undertakes no risk from the dangers caused by other workmen from want of care, attention, prudence, and skill, which the attention and presence of the master might have prevented. The principle of the contract in England being different, of course different results follow."

And Lord Cockburn expresses himself in still stronger terms. These views have been since affirmed in a variety of cases, particularly *Gray v. Brassey*, 1st Dec. 1852, where the subject was ably reviewed by the Lord President,—*Obyrne v. Burn*, 8th July 1854,—and the cases recently under appeal, in which the dictum of the Lord Justice Clerk has been repudiated, the whole practice following on it overturned, and the views adopted by the English judges established as the law of this country. This decision will commend itself to public approval as being in accordance with reason and common sense. It will, moreover, put an end to all those speculative actions against employers, which were becoming a reproach to the profession. The case is another added to the many instances in which we have been indebted to the House of Lords for the preservation of the purity of Scotch law.

IN SENATE
JANUARY 10, 1906
REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE
IN RESPONSE TO A
RESOLUTION PASSED
BY THE SENATE
MAY 1, 1899

THE LAND OFFICE
OF THE STATE OF
NEW YORK
ALBANY
1906

Under the provisions of the
Act of the Legislature of
1892, relating to the
sale of the lands of the
State, the Commission-
er of the Land Office
has the honor to submit
to the Senate the follow-
ing report:

The lands of the State
are divided into three
classes, to-wit: the
lands of the State, the
lands of the people, and
the lands of the State
and the people. The
lands of the State are
those lands which are
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The lands of the State
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keepers of horses and carts, which they acknowledged were not used by them for the purposes of husbandry. They had been each assessed at the rate of 7s. 6d., as the converted value of the work of a horse and cart for three days; and they contended, that this charge was illegal and not warranted by the provisions of the Local Statute Labour Act for the county of Linlithgow, being the 19 Geo. III., c. 12, passed in the year 1779. *Held*, that the pursuers were liable to perform statute service on any highway, bridge, or ferry, in the parish, or to pay the corresponding conversion money, as being the owners or keepers of horses and carts, not used for the purposes of husbandry. The assessment was imposed on them, not as the possessors of land, except to the extent they had themselves admitted, but as persons having horses and carts.

This result, however, was arrived at with hesitation on the part of some members of the Court.

J. F. WIELAND v. JAMES KING.—May 25.

Landlord and Tenant—Bankruptcy—Title to Sue.

In 1853, King entered into a contract of ground annual with Gemmell, the proprietor of a furnished house and garden at Port-Glasgow, under which contract, King obtained possession of the house and garden, and became bound to pay a ground annual of L.55, during the lives of Gemmell and his wife. In May 1856 King was sequestrated. In November 1856 he entered into a missive lease with Mr Wieland, whose letter of acceptance bore, "I hereby agree to take your house called Rossbank, and grounds thereto attached, at Port-Glasgow up to Whitsunday term 1857. . . . Should I not stay after Whitsunday 1857, I hereby agree to allow you full liberty to put the garden in order and crop the same, in the month of February." King's trustee having been called upon by Gemmell to make up a title to the property, he declined to adopt the missive between Gemmell and the bankrupt, "or to interfere with the subject at all." In April 1857, King being then an undischarged bankrupt, raised an action of removing, in his own name, against Wieland, who defended on two grounds (1), That King being unretrocesed, had no title to sue; and (2), That since the raising of the action he (Wieland) had got a right of ground annual of the subjects in dispute from Gemmell, on the footing, that in consequence of the trustee's declination to interfere, the subjects had reverted to Gemmell. *Held*, that Wieland being tenant under King, could not call in question his landlord's title to prosecute a removing; therefore, that King was entitled to decree of removing against Wieland, but that Wieland's right of property must be determined in a separate action.

MRS AGNES DOUGLAS OR HOUSTON v. ROBERTSON'S TRUSTEES.—May 28.

Succession—Vesting—Si sine liberis decesserit.

The late George Frederick Robertson was married on 6th September 1841 and died on 25th September 1845, survived by his widow—now Mrs Houston—and one child, a pupil, John George Frederick Robertson. A question arose between Mrs Houston and her child, whether the late George Frederick Robertson acquired any vested right to a share of two sums of L.5000 and L.2800—the succession to which was regulated by different deeds. Mr Robertson's grandmother conveyed her whole property to trustees, whom she directed to divide the residue of her estate into seven equal portions, and to pay one-seventh part to each of her two sons, and the remaining five-seventh parts to be lent on undoubted heritable security for behoof of her five daughters (of whom Mr Robertson's mother was one) and their children, including the *ius mariti*, "and taking the securities so conceived, that my daughters shall only be entitled to the liferent of their respective shares, and securing the fee to their respective children; the same to be divided equally among them, and each child's proportion to be payable upon such child's attaining to majority or marriage, whichever of these events shall happen next after his or her mother's death." The testatrix died in February 1826. The share of the residue provided to her daughter—Mr

Robertson's mother—Mrs Ann Houston or Robertson and her children, amounted to L.2800. She had four sons, all of whom attained majority. But George Frederick Robertson, the eldest, predeceased his mother, who died in 1852. The deed conferred a power of disposal of the fund by Mrs Robertson, in the event of her having no children, or of their predeceasing her. *Held*, that such a power was inconsistent with the idea of vesting in a predeceasing child: Therefore, that the fourth share, which would otherwise have belonged to Mr Robertson, did not vest in him.

The provision of L.5000 was regulated by the ante-nuptial contract of marriage of Mr Robertson's father and mother in 1819. By that deed, Mrs Robertson conveyed L.5000 to trustees, to be invested in securities, taken payable to themselves in trust, to pay the annual rents to her; and failing her, to her husband, for their liferent use alienary; and upon the death of the longest liver to "pay the principal sums hereby conveyed to the child or children of the said marriage, in such proportions" as she or her husband should direct—failing which directions, equally amongst them, "payable upon such child or children respectively attaining the years of majority or marriage, whichever of these events shall first happen after the decease of the last liver of the saids John Robertson, junior, and Mary Ann Hunter; and in case any of the children shall die before their shares shall respectively become due, then the share and halves of any of them so dying, shall accrue to the survivor or survivors, and be divided and payable aforesaid." *Held*, that the provision of L.5000 did not vest in the children of the marriage at their birth, or even at majority or marriage, and that right to the fee was necessarily suspended till the death of Mrs Robertson, the liferenter, in 1852. Had George Frederick Robertson left no issue at his mother's death, the share which would have belonged to him, had he survived, would have belonged, under the express terms of the destination, to his three surviving brothers, as conditional institutes. But as George Frederick Robertson left a son, who was alive when the succession opened by the death of the liferenter, that son was entitled to succeed to the share in question, not in respect of any right previously vested in the father, but as conditional institute under the implied condition *si sine liberis decesserit*.

MATTHEW LAIRD AND OTHERS v. LAIRD'S LEGATEES—May 29.

Trustee—Executor—Partnership—Liability to Account.

Thomas Laird died in 1838, leaving a trust-disposition and settlement, under which Matthew Laird alone accepted the office of trustee. In 1839 he assumed three additional trustees, but he alone continued to hold the office of executor. A large portion of the trust-estate consisted partly of the truster's undivided share and interest *qua* partner in certain companies, of which the trustee, Matthew Laird, had, along with others, been his copartners, and partly of certain sums due to him by the companies, on private account, and in the character and capacity of an ordinary creditor of the companies. This had been more particularly the case with regard to a company constituted in 1836, and which had become responsible for two earlier companies under the same firm. That company retained the executory funds, and employed them in trade, and realised profits upon them. But, according to the contract of copartnership, the truster's interest, on his death, should have been ascertained as at the preceding year's balance, and paid up to his representatives in instalments of six, twelve, and eighteen months after his decease. This not having been done, certain beneficiaries, under the trust-settlement, who were entitled to one-half of the residue, claimed whatever profits were made on their share of the trust-funds while it was so left in the concern. Matthew Laird and his co-trustees offered the share, with interest. But in 1855, the Court held that Matthew Laird was liable to account to the extent of whatever profits might have accrued to him through the employment of the claimants' share of the trust-estate and funds; but reserved the question, whether Matthew Laird was also liable for the profits appropriated

by his co-partners in the companies; and also, whether his co-trustees, assumed by him, were liable for any part of such profits, in consequence of their neglect, after their assumption, to see that the funds were taken out of the stock of the firm. The Court now *held*, that the funds left in the company stock by Matthew Laird's neglect to fulfil the injunctions of the trust-deed, fell to be dealt with only as a debt owing by the company. Matthew Laird himself, as trustee, was liable for the profits made by him; but it by no means followed that he was liable for the profits made by his partners. It must be taken as if he had lent the money to them,—in which case he would be liable for principal and interest, but not for the profits made by them on the borrowed money. (2.) Neither were the co-trustees liable for the profits: They would have been liable if the funds had been lost, but they were not liable to account for profits of which they themselves got none.

Authorities.—Williams on the Law of Executory, pp. 1566, 1569, 1570; Hill on the Law of Trusts, pp. 371–6; Watson, 3d May 1814, ii. Ves. and Beam., 414; Heathcock v. Holme, 3d December 1819, i. Jacob and Walker, 222; Docker v. Soames, 22d April 1834, ii. Mylne and Kean, 635; Wedderburn v. Wedderburn, 9th November 1837, iv. Mylne and Craig, 41; Jones v. Foxhall, 29th February 1852, xv. Bevan, 388; Cochrane v. Black, 1st February 1853, Session Reports, vol. xvii., 321; Campbell v. Keith, 9th July 1840, xii. D. 1367; Brown v. De Tastet, 15th September 1821, Jacob's Rep. 284; Crawshaw v. Collins, xv. Ves., 218, and xi. Russell, 325; Keble v. Thomson, iii. Br. Chan. Cases, 111; Booth v. Booth, November 1838, i. Bevan, 125; Hanbury v. Kirkland, iii. Sim., 265; Blain v. Paterson, 28th January 1836, xiv. S. and D., 361.

Poor SANDILANDS v. KING.—May 29.

Damages—Expenses.

Action of damages for breach of promise of marriage. *Defence*—A denial of the promise, and a justification on account of the alleged bad character and conduct of the pursuer. Verdict for the pursuer, damages 20s. At moving to apply the verdict, the pursuer claimed expenses. *Objected*—The action being one for reparation of a patrimonial loss, and not for the vindication of character, 20s. could not be considered substantial damages so as to carry expenses. Paterson, May 1849. *Objection* repelled, and expenses allowed.

OFFICERS OF STATE v. THE DIRECTORS OF THE SIGHTHILL CEMETERY COMPANY.
—June 1.

Teinds—Act 1681—Right of Lands, cum decimis inclusis.

In 1676 the Magistrates and Town Council of Glasgow resolved to sell part of the common property of the burgh, and on 6th July of that year the Convention of Royal Burghs passed an act ratifying dispositions to be made of the several parcels of the common muir specified, including a piece called the "cows lair," which it was now alleged was barren, and yielded no revenue of teinds, either parsonage or vicarage. In August 1676, with consent of the Archbishop of Glasgow, titular of the teinds, the magistrates disposed to Mr James Fairrie, lately one of the bailies of the burgh, All and Whole the lands of Cowlares, and the west part of that hill called Sighthill, "together with all and sundrie, ye tynds of ye samyne, great and small, parsonage and vicarage yrof included, never of before separate yrfra." This disposition contained a precept for infesting Fairrie in the same, "together with all and sundrie ye tynds of ye semin." The disposition has been lost, but Fairrie was infest, the sasine bearing, that he was infest in the lands "nec non cum decimis earund. inclusis nunquam ab eis. separatis," and all other pertinents thereof. On 17th September 1681, an Act of Parliament, ratifying the Act of the Convention of Burghs, confirmed the disposition in favour of Fairrie of the lands, "together with the teinds of the saids lands, great and small, parsonage and vicarage included, never of before separat therefrae." The lands are now possessed by the Sighthill Cemetery Company, who claim exemption from being localled on for stipend.

on the ground that they have a *decimas inclusas* right to the lands and teinds. The question arose in the locality of the parish of Maryhill, in which the lands were situated. The company pleaded that the Act of 1681 rendered it unnecessary for them to show a title with a *decimas inclusas* right prior to 1587 (the date of the act of annexation). The Act of 1681 expressly confirming the right, was better than an earlier right, of which the validity would only be presumed. At all events, they had no heritable right to their teinds, and could only be localised on *pari passu* with other heritors holding heritable rights, after the teinds possessed by parties who had no heritable rights, were exhausted. *Pleaded for the Crown*: The objectors having paid stipend for forty years, under a final locality, are now barred from claiming exemption from that payment. The deeds founded on are insufficient to establish a right *cum decimis inclusis*. *Held*, that the minister had acquired a prescriptive right to the stipend, and that the objectors had not established a *decimas inclusas* right. The feu disposition in 1676 was inconsistent with such a claim, and the ratification by King Charles the Second in 1681—which was only passed *salvo jure cujuslibet*—could not extend the grant made by that disposition. The charters in favour of the city of Glasgow, prior to 1676, showed that they did not hold these lands *cum decimis inclusis*; and although the archbishop was brought in to aid in giving such a right, he could not by that time validly grant it, and the subsequent statutory confirmation only validated the right given. The objectors' teinds were also liable to be localised on for stipend, before the bishop's teinds in the hands of the Crown. That was settled law. *Prestonkirk*, ix. D., p. 61; *Arrgask*, 13th July 1715; *Connel*, vol. i., p. 505; *St Andrews*, 10th February 1722; *Officers of State v. Campbell of Lochnell*, 7th March 1790, F. C.; *Skene v. Officers of State*, 3d June 1795, F. C.

DUFF, M'INROY, AND COMPANY v. M'MILLAN AND SON—June 3.

Damages—Process—Breach of Contract.

Action of damages by Duff, M'Inroy, and Company v. M'Millan and Company, shipbuilders, for having failed to finish a ship with all dispatch as per agreement, and also for having built her of sixteen tons greater tonnage than was agreed on. This last item of damages was thus stated in an account appended to the Summons, "To damages sustained by us in consequence of your not building the said vessel of the dimensions and tonnage specified in the foresaid agreement, and having in violation thereof constructed her, etc.; which damages consist of the price charged by you for the said extra tonnage, arising from the foresaid cause, amounting to £201, 10s., which sum you insisted on our paying before you would give us delivery of the builders' certificate, and which we accordingly paid to you on 17th April 1855, under protest," etc.

The defenders objected to the relevancy of the whole action, but especially this last item. This claim was not properly a claim for damages, but was rather of the nature of *condictio indebiti*, for which no grounds had been stated in fact or in law. *Replied*—The word "damage" is a flexible term. The claim is, in substance, one for repetition. *Held*, that the action, so far as it related to the second item, could not be sustained. It was not a proper claim of damages, although set forth in that form.

Petition—JAMES WEBSTER—June 4.

Poor's Roll—Process.

Petition for admission to the Poor's Roll. A remit to the reporters was opposed, on the ground, that the applicant in his statement to the kirk-session, stated that his wages were 19s. a week. *Replied*—A supplementary statement, by the petitioner now produced, will show that, after deducting taxes and an allowance to his mother, he has only 14s. 6d. per week. *Objected*—That such a supplementary statement was irregular and could not be received. *Alexander*, 4th June 1858. *Objection* sustained, and petition refused.

IN RE STEPHEN'S SEQUESTRATION.

Bankruptcy—Privileges of a Law Agent.

Stephens, a banker in London, came to Scotland in June 1857, for the purpose of taking out a sequestration. He employed a law agent in Edinburgh for that purpose, and for that alone. The agent dissuaded him from taking any steps then. But, subsequently, in October 1857, Stephens, still acting under the same agent's advice, applied for and obtained sequestration in ordinary form. A trustee was appointed. He proceeded to realise the bankrupt's estate in London, which consisted almost entirely of household furniture, but was met by the law agent, who claimed the furniture in virtue of an assignation by way of sale obtained by him from the bankrupt, in security of a loan of L.1000 advanced by the agent to the bankrupt in the month of August 1857. During the course of the bankrupt's examination, he absconded. The trustee then proceeded to examine the law agent, who deposed, that he had had a transaction with the bankrupt in reference to the furniture, for his own behoof. He was then asked,—"What was the nature of that transaction." *Objected*—A party holding such a right as that in question, is not bound to answer any questions in regard to it, unless the trustee renounce all intention of challenging that right, or of proceeding on the deposition for that purpose. *Replied*—Section 90 of the Bankrupt Statute gives the trustee ample powers to examine all parties—law agents and others, who can give information relative to the affairs of the bankrupt. *Held*, that the inquiry was competent. This law agent was in a position to give very important information as to the bankrupt's property. The L.1000 had to be accounted for; and how the law agent came to have right—acquired within a few weeks of the sequestration—to what was almost the only available estate of the bankrupt. Had the agent acted as law agent in such a transaction between the bankrupt and a third party, he would undoubtedly have been bound to answer all questions in regard to it; and by taking to himself the character of a creditor, in addition to that of law agent for the bankrupt, he could not deprive the trustee of the privilege which the statute conferred on him, of making a full investigation into the nature of the transaction.

HOPKIRK v. DEANS and ROGERS—June 8.

Process—Expenses—Taxation.

Deans and Rogers, solicitors in London, conducted two appeals to the House of Lords, on the employment of Hopkirk. This action was brought by them for their expenses. A remit was made to the taxing officer of the House of Lords, on certain objections to their charges. On 17th July 1856 (Thursday), the taxation was appointed to take place in London on Monday the 21st July, at 11 A.M. Notice of this appointment was received by the defenders' agent in Edinburgh between 11 and 12 A.M. on the 18th July. It was the usual notice given to London agents, but it did not appear that the defender employed an agent in London. Neither Hopkirk nor his agent attended the taxation, which went on in his absence. Hopkirk now pleaded that it could not be binding on him. Although three days might be timeous notice, when the parties or their agents were resident in London, it was not so when they were resident in Edinburgh. *Remit* made for new taxation, the defender paying the expenses of the former taxation and of the subsequent proceedings.

HENRY CHRISTIE v. JAMES THOMSON—June 9.

Public Officer—Privilege—Malice and Want of Probable Cause.

In an action of damages for alleged illegal seizure of tobacco in the premises of the pursuer, by the defender, a tide-surveyor, *Held*—That it was not necessary to take an issue of malice and want of probable cause. There was room for a distinction between that personal privilege which belonged to any subject in the exercise of his own ordinary rights and that class of cases which depended on the exercise, or undue exercise, of authority and power conferred by statute.

in the latter case, the parties must look to the protection given by the statute in the exercise of the power conferred by it, and there was no reason why, in this case, that protection should not be sufficiently ample.

ALLAN LIVINGSTON v. JOHN SMELLIE (Chalmers' Executor)—June 10.

Landlord and Tenant—Verbal Lease—Rei interventus.

Action for L.27, 10s. as a half-year's subrent from Whitsunday to Martinmas 1854, of a house which the pursuer alleged Mrs Chalmers had taken for two years from Whitsunday 1853. *Defence*—The lease, which was verbal, was for one year only. *Pleaded for the pursuer*—*Rei interventus* and tacit relocation—A proof was allowed, which established that Livingstone always refused to let the house for less than two years, and that it was in the knowledge of that fact that Mrs Chalmers came tenant; also, that at Whitsunday 1854 she did not remove all her furniture, & employed a house-agent to let the house till Whitsunday 1855, her alleged motive being, "if possible, to prevent loss, and thus avoid disputes." *Held*—That was perfectly competent to allow a proof of a verbal lease for two years, as the first step towards letting in the plea of *rei interventus* to validate such a lease—such plea had, in the circumstances, been established. Mrs Chalmers took the house into her own hands at Whitsunday 1854. This might have been for the purpose of preventing loss to all parties, but that ought to have been made matter of arrangement, and not having been so, it must be looked upon as an act of *rei interventus*. This was not a case of tacit relocation, but the pursuer had established sufficient to entitle him to decree.

MCERAY, CROALL, and Co. v. THE COMMISSIONERS OF HIGHLAND ROADS AND BRIDGES, and ARCHIBALD McNEILL, W.S., their Agent, Commissioner, and Cashier—June 10.

Declinature of Judge.

In this case the Lord President proposed to decline judging on account of his relationship to Mr McNeill, one of the pursuers. In order to obviate this, the Lord President lodged a minute, waiving all claims of expenses against Mr McNeill personally—*Declinature* sustained. It was not necessary that a judge's relation should have a personal interest in the action. It had been held that, if he was a trustee, that was a sufficient ground of incompetency in the judge.

ALEXANDER GOODSIR AND OTHERS (Smith's Trustees) v. HIS LEGATEES—June 20.

Trust—Agent.

A trustor expressly empowered his trustees to appoint agents and others, either of their own number, or other fit persons, for managing his trust, and upholding the rents of his heritable estate and principal sums and annual dividends, &c., of his moveable estate. The trustees appointed one of their own number to be agent and factor for the trust, and he made professional charges for the business transacted by him in the usual way. *Objected*—The office of trustee is gratuitous. A trustee acting as agent is not entitled to any remuneration. *Held*, that there was no law hostile to a trustor allowing his trustees, if he so pleased, to appoint one of their number to be factor for the trust, with remuneration for his services. The only question here was, had he done so? The trustor had used the word "agent," which, when it meant as here, "law-agent," eminently implied remuneration. So with the word "factor." Without this direction, the trustees could have appointed one of their own number as agent and factor, but he must have acted gratuitously. The only motive of the trustor in this direction, was to enable the trustees to give one of their own number, acting as agent or factor, the ordinary remuneration. By this means, the party so acting, would be liable in far higher diligence than if he acted gratuitously.

SECOND DIVISION.

RINTOUL v. WILKIE.—May 22.

Filiation—Forum—Expenses.

This was an ordinary action of filiation and for aliment of an illegitimate child, which was raised by the pursuer in the Court of Session. The pursuer resided in Edinburgh, and the defender in Fife. The case resulted in a judgment in favour of the pursuer; but the Lord Ordinary, in respect of the action having been brought in the Court of Session, only found the defender liable in expenses, *subject to modification*. On a reclaiming note by the pursuer, the Court, without giving any encouragement to the bringing of such actions unnecessarily in the Supreme Court, altered the Lord Ordinary's interlocutor, to the effect of finding the pursuer entitled to full expenses. The ground of judgment was, that the parties resided in different counties, and that in this case there was no propriety in raising the action before the Court of Session.

WEIR v. AITON.—May 25.

Exclusive Privilege—Ferry on Navigable River—Rights of Neighbouring Proprietors.

Aiton, a contractor, while engaged in making certain improvements and alterations on the banks of the river Clyde near Yoker, took his workmen across the river to and from their work in a boat which he procured for the purpose. He did so within the limits of a right of ferry, called Renfrew Ferry, which Weir was tacksman. Weir presented a petition for interdict to the Sheriff of Renfrew. It was not alleged that the boat was used for hire, or for carrying others than Aiton himself, his family, servants, visitors, and persons employed in his works. He opposed the petition, and stated, that the use of the boat had been a matter of necessity, as the works were situated at a considerable distance from the ferry, and at a place not supplied with ferry boats of that description. The sheriff-substitute and the sheriff granted interdict only against the use of the boat for hire, or for carrying others than the respondent himself, his family, servants, and those employed in his works; and, on the authority of the cases noted below, *quoad ultra* assolizied Aiton, and found him entitled to expenses. The Court, after hearing the case fully opened, concurred in the judgment pronounced in the inferior Court. The cases under-mentioned were held to settle the point.

Authorities for Respondent.—Tarbet v. Bogle, Dec. 22, 1731, M. 4167; Martin v. Thomson, June 16, 1818, F. C.

WHYTE v. KNOX.—May 26.

Insurance—Bankrupt—Discharge.

William Knox, after effecting a policy of insurance on his own life, became insolvent, and executed a trust-deed, whereby he made over his whole estate to a trustee for behoof of his creditors. At this time the policy of insurance was of little or no value, and was not taken up by the trustee. It was kept up, however, by a relative, by whom the premiums were duly paid. Having received certain dividends, the creditors discharged William Knox and his estate of all debts, and exonerated and discharged the trustee of his whole intromissions. On the death of William Knox, in 1854, his brother, the respondent George Knox, was confirmed executor dative on his estate, and claimed the contents of the policy as such. The creditors also came forward and claimed these, alleging that the policy had been concealed from them, and had not been given up as part of the trust-estate. A multipointing was raised by the Insurance Company, in which claims were lodged for these parties respectively, the creditors being represented by Whyte, who was appointed judicial factor on William Knox's trust-estate, in room of the trustee, deceased. In this action, the claim of the creditors was founded on the allegations set forth above, but no reduction of the discharge was offered, and no relevant averment of fraud was made. The sheriff-

substitute and sheriff of Aberdeen repelled the claim of the creditors, and sustained that of the executor; and the creditors having advocated, the Court affirmed the judgment, holding that the claim of the creditors was excluded by the discharge.

TULLOCH'S EXECUTORS v. DAVIDSON'S REPRESENTATIVES.—June 3.

Bank—Liability of Directors—Fraud.

The executors of the late Dr Tulloch concluded in this action against the trustees and general disponees and executors of Duncan Davidson for the sum of L.1000, paid by Dr Tulloch for shares in the Aberdeen Bank in October 1834; for the sum of L.250, paid as calls on these shares at subsequent dates; and the interest on these sums from the date of payment; under deduction of whatever sums were paid as dividends on the shares; or otherwise, for the sum of L.3000, or such sum as the pursuers should be found entitled to as loss and damage. It was averred as the ground of action, that subsequent to 1828, when the shareholders of the bank entered into a new contract of copartnership, Mr Davidson was a director, and fraudulently employed his power as a bank director to make, or allow advances to be made, without security, to the extent of L.235,000, five parties condescended on, and to other persons to the extent of L.56,000, and when he and the other directors knew these advances to be irrecoverable, and when they were written off as irrecoverable on the bank books; that in reports to the shareholders these losses were concealed, the bank represented itself prosperous, and dividends varying from 6 to 7 per cent. recommended to be paid, and a bonus of 2 per cent.; that by these reports, which were circulated by Davidson and his co-directors, the late Dr Tulloch was induced to purchase, in 1834, ten shares of the bank, at the price of L.100 per share, whereupon the loss and damage sued for by the pursuers was alleged to have arisen.

It was urged by the defenders that the action was irrelevant; that the reports would have been produced on which the pursuers founded; that on certain points, the facts averred were not set forth with sufficient precision, particularly considering that the action was directed at such a distance of time against the representatives of a deceased person; that the purchase was not of shares belonging to Mr Davidson, or to the bank, but from private shareholders in open market, in which case there was no privity of contract between Dr Tulloch and any of the directors, out of which the legal liability sought to be imposed on the defenders as representing one of the directors, could emerge; and that this claim for damages could only be sued for by the company. The Court held the action relevant, and allowed the pursuer to lodge issues.—*Observed*, it could not be held that the directors of a joint stock company, who, to suit their own ends, gave a false credit to the concern by paying dividends out of capital, and so induce parties to invest funds in the stock of the company, could be free from liability to such parties as thereby lost their money. The value of the stock of such companies was much influenced by the reports of the directors; the fraudulent concealment by the directors of the company's affairs, could not therefore be viewed as a matter with which the public and intending purchasers of stock had no concern; it was on them that the fraudulent acts of the directors were induced to operate, and they were the parties deceived. It was the proper consequence of a party having suffered loss from the wrong-doing of the directors, that the party suffering that wrong should be entitled to redress for the consequences. The claim for damages was not properly a debt or other claim due to the company, but a claim for loss alleged to have been suffered by Dr Tulloch, through the wrongous acting of the defender's predecessor; and there existed no sufficient ground for dismissing the action.

SMITH v. GRANT AND LESLIE.—June 5.

Liability of Law Agents for the proper management of a Law-suit.

Smith employed the defenders to prosecute three farm-servants for desertion of service, under the statute 4 Geo. IV., c. 34. They were apprehended and

brought before three justices of the peace, who, after taking declarations from them, found them guilty of breach of their agreement of service, and sentenced them to eight days' imprisonment. After the servants had undergone the imprisonment, the Court of Justiciary suspended the sentence, and found the complainers entitled to expenses, "in respect that the declarations of the complainers, on which the conviction bears to have proceeded, were not authenticated by the signature of the justices." In this action, the pursuer concluded in relief of the damages and expenses, to which he alleged he had been subjected in consequence of the irregularity of the proceedings before the justices. It was pleaded for the defenders: It was not their duty to see to the due authentication by the justices of the declarations of the accused parties,—that was the duty of the clerk of Court, on whose proper performance of a public duty the defenders were entitled to rely: Neither was it the defenders' duty to judge of the sufficiency of the evidence on which the justices thought proper to convict: there was nothing averred here to justify the allegation, that the defenders had been guilty of gross negligence, on which the action was necessarily based.—The Lord Ordinary (Mackenzie) assolized the defenders. After hearing parties on reclaiming note, the Court altered the judgment. *Observed* by the Lord Justice Clerk, with whom the rest of their Lordships concurred:—"Law agents employed to conduct proceedings that may end in personal punishment, are employed in matters of the greatest delicacy, and of much risk. The case in question was carried on before justices of the peace, who were notoriously in need of professional aid. The signature by the justice of the declarations of accused persons should have been appended in open court; and it might easily be seen by the agents present whether such declarations were signed by the justices as required by the statute, and inattention as to whether such declarations were signed was certainly a blunder in the proper management of the case."

Pursuer's Authorities.—Currie v. Colquhoun, 17th June 1823, ii. S. and D. p. 407; Morrison v. Ure, 2d June 1826, iv. S. and D., p. 666; Frame v. Campbell, 9th June 1836, xiv. S. and D., p. 914; in House of Lords, 18th June 1836, i. Rob., p. 595.

Defenders' Authorities.—Logan v. M'Adam, 5th December 1853 (Justiciary), i. Irvine, p. 329; French, Gill, and Murdoch v. Smith (Justiciary), ii. Irvine, p. 198; i. Bell's Coms., p. 461.

HUNTER AND COMPANY v. THE CALEDONIAN RAILWAY COMPANY.—June 8

Liability of Carriers.

The pursuers, merchants in Glasgow, sent by the Caledonian Railway, a parcel of goods to John Rae, draper, Sudbury in Suffolk. The address did not specify the county of Suffolk, and as there are other two places in England called Sudbury, the railway officers sent the goods to the nearest station of that name, which is in Derbyshire; when they arrived there they lay for some days, while inquiries were prosecuted in the neighbourhood for a draper of the name of the consignee. After correspondence with Glasgow which occupied some time, and was the more tedious in respect the letters were sent by "goods trains," instead of by post, the goods were despatched for their proper destination in Suffolk. On the way a snow-storm delayed them, so that they only reached it on 9th January, too late for the Christmas demand, which they were ordered to supply. They were refused by the consignee. The pursuer pleaded, that it was the duty of the railway officers, when they saw the address was ambiguous, to have asked the pursuers for the proper address, and when they became aware that the goods had been mis sent to Sudbury, in Derbyshire, to have communicated with Glasgow through the post. The Court assolized the defenders. *Observed*—The origin of the mistake was the carelessness of the pursuers in despatching the goods without a sufficient address; and though there might have been some blame attachable to the railway company, for want of sufficient promptitude in communicating with the consigners, that did not entitle the pursuers to make the railway company liable for what originated in their own fault.

M'INROY OF SHIERGLASS v. THE DUKE OF ATHOLE.—June 11.

Construction—Salmon-Fishing.

The pursuer acquired the lands of Shierglass, part of the earldom of Athole, Charles Stewart, whose predecessors had held them under the defender's predecessors, who, under titles from the Crown, were infest in the whole salmon-fishings within the earldom. The river Garry cuts off a small part of the lands of Shierglass from the rest of the estate, so that the lands of Shierglass extend to the north bank for a distance of 1130 yards, and along the opposite bank for a distance of 2448 yards. Prior to 1736, Stewart of Shierglass did not possess the right of salmon-fishing in the Garry; but in that year, the then Duke of Athole, by feu-contract, granted to Neill Stewart, then of Shierglass, the "privilege of salmon-fishing upon the water of Garry, in so far as the lands of Shierglass extend, and no farther." Mr M'Inroy raised an action, concluding for declarator, that he had the sole right of salmon-fishing in the Garry so far as his lands of Shierglass extended, and that the Duke should be interdicted from fishing in the Garry by himself or others, or trespassing on, or interfering with, the pursuer's right. The Lord Ordinary allowed a proof; he held, that the pursuer had for forty years enjoyed the sole right of salmon-fishing beyond the extent to which his lands lay, on both banks of the river, and that where his lands were on one side of the river, he had only right to fish *ex adverso* of his own lands; and to that extent, found that the pursuer had exclusive right. The Lord Justice Clerk adhered to this interlocutor, the Lord Justice Clerk dissenting.

SIR WILLIAM DON, Bart., v. RICHARDSON.—June 16.

Bill of Exchange—Gaming Debt—Relevancy.

Henry Richardson, as indorsee in a bill accepted by Sir William Don in favour of one Green, alleged to be the keeper of a gambling house in London, obtained decree against Sir William Don for the sum of L.360. The bill was drawn, and was payable in London, and bore "value received." Richardson having given Don a charge upon this decree, the present suspension was brought. The grounds of suspension were, that the bill had been granted on account of gaming debts, and that it had been acquired by Richardson without full value, and "with notice and knowledge of its nature and origin." The suspender alleged further, that by the law of England a bill granted for a gaming debt was void and irrecoverable, even in the hands of a *bona fide* onerous indorsee. This allegation, however, was negatived by the opinion of English counsel. The suspender then maintained that he was, at all events, entitled to a proof *prout de jure* on the general issue,—Whether the bill had been granted on account of gaming debts, and whether it had been acquired by the charger in the knowledge that it had been so granted? He founded on the case of *Ainslie v. Sutton*, Dec. 14, 1851, xiv. Dun., p. 184. The charger pleaded, that there was no distinct or relevant averment that the bill had been granted for a gaming debt, and that therefore the case of *Ainslie v. Sutton* did not apply. The suspender's statements on the subject were vague and meagre. In substance they were,—That the bill was obtained on occasion of a dinner in 1849, at which the suspender had met Green, on account of old bets, or "alleged bets," on races with Green, or with others whom Green acted. What the bets were; with whom; on what races, or at what time or times they had been made, was not stated. All the suspender averred was, that he thought they were bets on the Doncaster St Leger prior to 1846, and he did not offer to make his statements more distinct and specific. Lord Neaves pronounced an interlocutor, finding "That the suspender's statements on record are not such as to entitle him to a proof *prout de jure*." The Court refused a reclaiming note, and adhered.

M'Bey v. GARDINER.—June 22.*Sale of Horses—Warranty—Mora.*

M'Bey, a farmer and cattle-dealer, purchased a horse from Gardiner, at a market, for L.35 which Gardiner warranted sound. Three days afterwards, the purchaser found the horse had stringhalt, which was immediately intimated to the seller by letter. The seller refused either to admit that the horse was unsound at the time of the sale, or to take it back. Three weeks afterwards, the buyer again wrote, asking the seller to take back the horse, which the latter refused to do. The horse was then kept, as the purchaser alleged, in his own livery stable, for a month, when it was sold, under a warrant from the sheriff, for L.25. For the difference between that sum and the price he had paid, and the cost of keep in his own livery stable, both sums amounting to L.26, M'Bey raised an action in the Sheriff Court against Gardiner, who was assoltizied. The judgment was brought under review by reduction. The Lord Ordinary (Ardmillan) repelled the reasons of reduction. *Observed*—This was not a case of a latent defect, and it was the purchaser's duty, which, as horse-dealer, he should have been aware of, when he found the seller intended to abide by the sale, to put the horse into neutral custody without delay, so that the true condition of the animal might be ascertained, and it might be preserved from any treatment tending to depreciate its value. This he did not do, and in the whole circumstances, and after keeping the horse nearly two months, the action was ill-founded. The Court adhered on the same grounds.

ROBERTSON v. J. AND J. GOW.—June 25.*Weights and Measures—Stat. 5 and 6 Will. IV., c. 63.*

Robertson agreed to purchase 2000 stones of hay from Messrs Gow, the bargain being, that "*each stone should consist of twenty-two pounds.*" In an action of damages, at the instance of Robertson against Messrs Gow, for non-implementation of the contract, they pleaded, that the alleged sale was null and void, under the Act 5 and 6 Will. IV., c. 63, in respect it was not made according to the imperial standard weight thereby provided, and the claim of damages for breach thereof, was untenable. The Lord Ordinary (Neaves) repelled this plea. The Court adhered. *Observed*—The bargain was not struck at by the statute founded on, in respect, that though in one sense the stone referred to in the contract was not a legal weight, still a weight of twenty-two pounds was a legal basis of a contract, as being a multiple of a pound weight. It was declared by the statute, that bargains might be made by any multiple of the pound weight; that benefit was not to be lightly forfeited. And as it seemed clear that a sale of 2000 quantities of hay, each to weigh twenty-two pounds, would have been a good bargain, it was not to be vitiated because these quantities were called "stones."

Authorities.—Hughes v. Humphreys, iii. Ellis and Blackburn, 958; Giles v. Jones, xxiv. Law Journal, new series (Exchequer Reports), 259. The latter was principally rested on in the Inner House.

STEWART OR M'LACHLAN v. BARSTOW (M'LACHLAN'S TRUSTEE).—June 25.*Husband and Wife—Construction of clause containing Provision to a Wife in a Contract of Marriage.*

By an ante-nuptial marriage-contract, Mr M'Lachlan bound himself, in case his wife should survive him, to pay to her yearly an annuity of L.150, at five terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas after his decease. In further security of this annuity, he disposed certain lands in security to her of "an annuity of L.150, or such other sum as, by law for the time, should correspond to the principal sum of L.3000," and of that sum itself, as a provision for his children; the lady was infeft in security for her own right

liferent, and for behoof of her children in fee. The security thereby created as held to be effectual (see *ante*, pp. 46, 167). Mr M'Lachlan also bound himself to pay to her L.150 in lieu of her claim for mournings and forment up to the first term of Whitsunday or Martinmas after his death. The proceeds of the estate not being sufficient to satisfy the claims of all the creditors, a trustee for their behoof was appointed. Mr M'Lachlan died on 11th July 1852. Mrs M'Lachlan claimed the first half-yearly payment of her annuity due on Whitsunday thereafter. This claim was resisted by the trustee, on the ground that she was only secured in the annual rent of L.3000, and she could not claim a half-year's annuity before the principal sum had yielded any interest, and she had a provision for her aliment till the first payment became due. *Held*, unanimously, that the widow was entitled to the first half-yearly payment on Whitsunday 1852, and payment not having been then made, that she was entitled to interest from that term on the payment then due.

APPEALS IN THE HOUSE OF LORDS.

GEIKIE OR YOUNG AND OTHERS v. MORRIS AND OTHERS.

Process—Multiplepoinding—New Claimant—Expenses.

(Court of Session—Second Division—11th July 1856—18 D. 8118.)

This was an appeal, arising out of the proceedings relating to the Morgan succession. When the multiplepoinding was raised by Mr Lindsay, judicial factor, a great many claimants appeared, stating different degrees of relationship. The Morrisies, as nearest in degree, were, after much litigation, preferred. When they moved for warrant and decree of payment, certain parties, named Skie and Lockie, not called in the multiplepoinding, appeared, and insisted on their right to lodge claims so long as the fund was undistributed. The Second Division pronounced an interlocutor, finding that, "after all the procedure that has occurred, they (the Geikies) can only be allowed to compare, on the condition of paying one-half of the taxed accounts of the expenses incurred in the discussions with Alexander and James Morgan, by the parties whose favour decrees of preference have been pronounced, being the sum of 1533, before such claim can be received." The Geikies not having paid this sum, their Note was afterwards refused. They then appealed to the House of Lords.

The LORD CHANCELLOR said that their Lordships would find no difficulty in coming to the same conclusion as the Court of Session in this case—that the appellants had no absolute right to come in and lodge a claim in this multiplepoinding, and if they had no such right, then it would be for the Court to decide upon what terms they would be allowed to come in. Here the parties were seeking to be let in had never made their appearance till after the decree of preference had been pronounced, and when there was an expectation that the money was about to be distributed. The effect of such a decree he took to be of this nature. So long as the fund remained *in medio*, any creditor might appear in the multiplepoinding, and a fund was said to remain *in medio*, so long as there were contested claims undisposed of; but the moment a decree of preference was pronounced, this right of creditors was at an end, and thereafter they could only proceed by action of reduction of the decree, or an action against the party to whom the funds had been paid over, as the case might be. Therefore, as in the present case, a party wished to come in after a decree of preference had been pronounced, he could only claim this not as a matter of right, but as matter of favour, and consequently the Court could impose any reasonable condition on granting that favour. That being so, the only question was, whether the Court of Session had exercised a wise discretion in imposing

the terms they had done. He thought there was no ground for saying that they had not exercised a reasonable discretion. The appellants had apparently heard of the proceedings some time before they came into Court; and if they had been admitted without sharing in the great expenses which the other alleged next of kin had incurred, it would be most unjust. They wished to obtain gratis all the advantages which those similarly situated had been compelled to fight for at an enormous cost. This could not reasonably be permitted, and, therefore, he would recommend the interlocutor of the Court of Session to be affirmed.

LORD BROUGHAM said he certainly felt some embarrassment in this case, but upon the whole, he thought the Court below had the power to impose terms on the appellants before letting them in at the stage at which they appeared. As to how far the discretion exercised had been reasonable or not, he did not doubt; but even if he had doubted, he would have been slow to differ from his noble and learned friend and from the Court below, on such a matter as this.

LORD CRANWORTH said he quite agreed in the view taken by his noble and learned friends. In England it was a familiar saying, that law was best when it was most like equity, and equity was best when it was most like law. Sometimes it had been thought that their Lordships were disposed too often to apply what was considered law in England to doubtful cases from Scotland; but applying the before mentioned saying, he could not help thinking that he liked the Scotch law best when it most resembled English law, and he did not like English law worse when it agreed with Scotch law. Now, looking to what would have been the course in the English Courts in reference to a case like this where a suit of interpleader had been brought, he had no hesitation in saying that precisely the same course would have been pursued. First, the next of kin claiming to be nearest in relationship, would have been ordered to prove their case, and if, after a decree and order of distribution, new parties had come forward and asked to be let in, the Court would have taken just the same view as the Court of Session, and imposed on those parties the condition of bearing their share of the costs already incurred. The Court was not bound to admit them at all; but to save trouble and give them a short cut, as it were, to the same goal, the Court would have said—"We will let you come in on condition of your paying the same costs as you would have been obliged to pay if you had appeared from the first." That was a reasonable decision; and indeed the Court could not properly have done otherwise. The interlocutor must therefore be affirmed; but as the appellants sued here as paupers, it would be affirmed without costs.

Affirmed.

THE BARTONSHILL COAL COMPANY v. REID, etc.

Master and Servant—Reparation—Injury by Fellow-Workman.

(Court of Session, July 3, 1855, 17 D. 1017.—House of Lords, June 17, 1858.)

The question here was, whether a master was responsible for injury sustained by one of his workmen, through the fault or negligence of a fellow-workman.

The late Wm. Reid was a miner in the employment of the defenders, who are coal masters. On the 17th September 1853, the engineman allowed the bucket, in which Reid and another workman named M'Guire were coming up the pit, to come in contact with the scaffolding, whereby it was overturned, and Reid and his companion were precipitated to the bottom. They were killed on the spot, and an action was brought by the widows and children against the defenders, on the ground that the accident was caused by the fault and negligence of the engineman, for whom his employers were responsible. The First Division of the Court decided for the pursuers, and the defenders appealed.

Lord CRANWORTH now delivered judgment as follows:—

The question raised by the appeal was, whether, in the working of a mine, where one servant is killed by the negligent conduct of another servant employed in the common work of the mine—that other servant being otherwise quite competent to do the duties assigned to him, the common employer of both is liable to the representatives of the servant killed. Where any stranger is injured by the act of a servant employed in the business of his master, and seeks to render the master responsible for such injury, he is bound to prove that the servant was guilty of some negligence, and that the servant so guilty was at the time in the ordinary business of the master. In such cases the ordinary maxim of *respondet superior* applies. Thus—if the coachman, while driving his master's carriage, negligently drives over a bystander; if a gamekeeper, in firing at a pheasant, negligently kill some person standing near; if a builder negligently construct the scaffolding so that a person passing is injured—in all such cases the master is liable, for the act of the servant is treated as the act of the master. The principle seems to be that it is impossible to know how far the negligent act may not be due to the master himself—it is difficult to distinguish between him and his servant, and a stranger has a right to say—"I care not which of you caused the injury; I am entitled to treat you as one and the same, and I will look to you and the master." Many of the ordinary employments of life are attended with more or less risk to third parties, and it is not unreasonable that the law should treat the master as responsible for the negligence displayed by the servant, seeing that in general he has it in his power to employ servants who will not be likely to show such negligence. But does this principle apply to the case of fellow-workmen engaged together in the same employment? He thought not. When one workman enters into an engagement in which many other fellow-workmen are employed, he in general knows the risks he is exposing himself to, if it is such an employment that the slightest negligence of one servant may be fatal to another. There are accidents which in general the master can in no manner prevent or control; it is incidental to some employments more than others; and it is obviously no objection to say that the master need not have engaged the servant unless he meant to warrant him against such accidents. Risks of that kind are more within the immediate control of the servants themselves than of the master. Therefore, the ordinary principle of holding a master responsible for the negligent act of a servant does not apply to cases where a fellow-servant is the party injured. That this is the settled law in England there can now be no doubt whatever. Many of the cases involving this view of the law had occurred in the English Court of Exchequer; and though they were not binding on the supreme tribunal, still they had been so universally assented to, and adopted by nearly all the judges, that the law might be considered beyond change. Then, if the law was so settled in England, why was it not the same in Scotland? The law had been settled in England, not on any technicality, but on principles of universal application, and it would be highly inexpedient that a different law should prevail on different sides of the Tweed. Was there any ground on which the law of Scotland could differ, or ought to differ, from the law of England? It was said that in two late cases decided in the House some countenance had been given to the assumption that there was a difference, but those cases did not warrant any such inference. Those cases did not turn on the point whether a master was responsible for injuries caused by one servant to his fellow-servant, but on a point which was common to the law of both countries—viz., that when a servant was engaged in an employment of great risk, the master was bound to take every care that the machinery used is in proper order, and well adapted to the work required. Then, were there any cases decided in the Court of Session which warranted the contention of the respondents? There were many recent cases, from *Sword v. Cameron* down to the present time; but, on examining all the circumstances of those cases, it would be found that they turned on different points, about which there could be no dispute either in England or Scotland, such as, that a

master is bound to use all diligence in providing for the safety of his servants wherever there is more than ordinary risk involved in the employment. It was true that Lord Justice Clerk Hope and Lord Cockburn had gone beyond what was necessary in one of those cases, and thrown out the *dicta* that countenanced the doctrine subsequently set up in this case, but the other judges—Lord Medwyn and Lord Murray, the Lord President and Lord Ivory—put their decision on other and better grounds. The conclusion he had come to, after examining all the Scotch cases, was, that there had been no such clear and settled rule in the law of Scotland as to impose on their Lordships' House the necessity of holding a different view from that taken in the law of England. That view is, that where several workmen are engaged in one common employment, they know, or ought to know, the risks of the carelessness of any one to each of the others, and those are risks against which no master can in general provide, and for which he cannot be held responsible, unless he can be shown to have knowingly engaged incompetent or unsteady servants, or employed defective machinery. It was no doubt true, as had been remarked by the Lord President, that the difficulty was to make out what was a common employment. Here, however, that difficulty did not arise. It could not be said that Reid, the miner, working coal in the mine, was not engaged in a common employment with Shearer, who had charge of the engine by which he was let down and taken up every day in the course of his work. They both contributed directly to the common employment of working the mine. It followed also, in the present case, that no relevant case had been stated against the appellants. All that Mrs Reid alleged in her condescendence was, that Shearer was not sober at the time of this accident, but there was no allegation that Shearer was not a competent servant, and well fitted to take charge of the engine. The result will be, therefore, that the interlocutor of the Court of Session will be reversed. He could not conclude this opinion without referring to a most able judgment of Chief-Justice Shaw, an American judge, who had in 1842 considered this same question, and had come to the conclusion that the recent decisions of the English courts were well founded in reason and good sense.

The House would say nothing about costs, as the judgment of the Court below seemed to be fully warranted by the previous decisions in Scotland.

Reversed.

BARTONSHILL COAL COMPANY v. M'GUIRE.

Appeal—Competency.

This action was at the instance of the widow of Reid's companion, who was killed at the same time. The two cases being identical, the counsel entered into a joint minute, "that the present cause should, so far as regards the said first and second pleas of the defenders, abide the decision thereof in the said action at the instance of Mrs Reid, and that the same judgment be pronounced in the cause on said two pleas in law as in the said other cause." After the verdict and interlocutor disallowing the exceptions in Reid's case, that case was appealed to the House of Lords, and the defenders were prepared to abide the result of that appeal. But after the fourteen days had elapsed, and no formal petition of appeal had been presented in this case, the pursuer's agent extracted the decree, and was proceeding with diligence, when the defenders, to protect themselves, were compelled forthwith to present a petition of appeal in this case also. The pursuer then presented a counter petition, complaining that it was incompetent to appeal the case, as the defenders had allowed the fourteen days to elapse before lodging the petition on the point of competency.

The LORD CHANCELLOR said, he thought that the objections against the competency could be got rid of, because the issues put the case on grounds which involved no liability on the defendants, and therefore judgment could be given on the record, independent of the interlocutor disallowing the exceptions.

Reversed.

THE

JOURNAL OF JURISPRUDENCE.

JURY TRIAL IN CIVIL CAUSES.

SCOTLAND has now had fully forty years' experience of Jury Trial in civil causes; and we venture to say, each year increases the strong public feeling which in this country has always existed against it. It is a system repugnant to the hereditary characteristics of our forms of judicial procedure,—was always viewed with jealousy on account of its foreign origin,—and, after the above lengthened experiment, it has failed to commend itself to the approval of the public. The time seems now therefore to have arrived for a reconsideration of the utility of the institution. It is one of the natural results of a system of jurisprudence so ancient as ours, that when its rules become settled and well defined, the greater part of the judicial business of the country should be the investigation of matters of fact. Accordingly, it is daily becoming more necessary that the machinery employed for this purpose should be freed from the many objections, on the score of expense and uncertainty, to which this most unpopular tribunal is now open.

Trial by jury, like many other institutions, on its origin being minutely investigated, will be found, as it now exists, not to retain a vestige of its original nature and form. In England, where it is a universal hobby, though its value is considered by many a popular delusion, it will be found, that some centuries ago no such institution existed. When any crime, delict, or wrong was committed in a particular place, it was common for law courts to call together from that place a number of men most likely to know the facts, whom the judge examined as witnesses, and then determined the case. In process of time this practice became part of the customary

law ; and, from being mere witnesses, the men so brought together claimed the privilege to decide the facts at issue. This custom, regarded by our southern neighbours as a privilege, has been pronounced, by other countries of no small intelligence, to be a serious evil, calculated to obstruct the course of justice, and render the decisions of courts uncertain. It is somewhat remarkable, that so distinguished an authority as Judge Blackstone has aided, unwittingly, in perpetuating this delusion, by stating broadly, that the stipulation for the *judicium parium*, in the Magna Charta of King John, is a stipulation for trial by jury. That important bulwark of English liberty contains no such stipulation. Blackstone has confounded two distinct modes of trial. The *judicium parium* was a feudal court, where the *peers*, or common vassals of the same lord, sate as judges with him, to decide controversies arising between the co-vassals. In point of fact, no traces of jury trial, at all corresponding to its present form, existed in England till the reign of Edward VI.

In this country, jury trial, in civil as well as criminal matters, is as old as the time of William the Lion ; but the ancient juries had many features of distinction from those of modern times. They were the freeholders attending the courts of the barons to whom they owed suit. They combined the double character of witnesses and judges, deciding on their own knowledge of the facts (*Reg. Maj.*, b. i., cap. 12). They were altogether independent of the judge, whom they might remove out of Court, "until the judgement be discussed be soytours of the Court." Their verdict was a judgement on the whole matter ; and the province of the judge seems only to have been "to informe the suitors, gif they be ignorant of the law anent wardes (interlocutors) or decreits."—(See Ivory, 2, p. 272, and Glassford, ap. 2.)

This system fell, so far as civil cases are concerned, on the establishment of the Court of Session, the judges of which decided on both the law and facts disclosed in a case. It has even been conjectured that the number of judges was made to consist of fifteen, so as to supersede the use of juries. In criminal cases, the guilt of one accused was always inquired into by an inquest of his neighbours, or "convassalos ;" and, with the exception of the change in the mode of summoning the jury, introduced by the Act of Geo. IV., our present practice may be said to remain on the footing on which it was placed by the Act of James VI., and the Regulations of 1672. Experience has shown that such inquiries, as a matter of political expediency, are safest in the hands of a jury. A criminal case, unlike the two opposing interests to which an ordinary civil suit is confined, is a matter of public and political concern. It is a question between society and one of its members ; and in the determination of such questions, society has most confidence in itself. Our criminal jurisprudence is a simple system ; and the issue in the general case may be easily comprehended by a body of plain, unlet-

tered men. Their judgment is taken as the honest expression of public opinion, uninfluenced by the associations of power and place, and free from the objections to which a judge, as the organ of the Government, would be exposed. It is no doubt true, therefore, that in political questions, and such as relate to the liberty of the subject, and of the press—treason, sedition, and criminal cases generally,—especially prior to the Revolution of 1688, when judges were removable at the will of the sovereign, the intervention of a jury has been found calculated to check the influence of venal judges, and to guard against the despotism of a government. But to this class of cases the usefulness of juries is limited. A civil suit concerns only the litigating parties. It is not to be decided from crude notions of general justice, or fanciful presumptions from character or preconceived opinions. It requires a cool judicial mind, a capacity for following a lengthened chain of evidence, or for unravelling a series of complicated facts. For this duty it is supposed that any petty shopkeeper is qualified who rejoices in the possession of real estate worth £5 a-year, or personal property to the extent of L.200. Can we wonder, then, that a trial by jury approximates in many respects to game of chance? Surely an able judge, accustomed to investigate matters of fact, and to apply the rules of legal evidence, who has leisure to sift every point of a case with rigid accuracy, and who may postpone its consideration from day to day until he is satisfied of every fact to be investigated, is the party more likely than any other to reduce a question of fact nearest to the precision of a mathematical problem. How is it possible, with comfort or safety, to entrust such questions to the determination of twelve men whose pursuits and avocations lie in far different channels; and where the despatch with which they must determine seems to be in the inverse ratio of their qualifications to do so? A Scotch jury (it has been well remarked), even in Edinburgh, frequently presents the following particulars for observation:—"It consists of twelve men, eight or ten of whom are collected from the country, within a distance of twenty or thirty miles from the capital. These individuals hold the plough, wield the hammer or the hatchet, or carry on some other useful and respectable, but laborious occupation, for six days in the week. Their muscular systems are in constant exercise, but their brains are rarely called on for any great exertion. They are not accustomed to read beyond the Bible and an occasional newspaper: they are still less in the habit of thinking. Counsel address long speeches to them, numerous witnesses are examined, and the cause is branched out into complicated details of fact and wire-worn deductions in argument. Without being allowed to breathe fresh air, or to take exercise or food, they are confined to their seats till eight or ten in the evening, when they retire, to return a verdict by which they may dispose of thousands of pounds." In such circumstances these luminaries are called upon before separating to answer certain issues, *yea* or *no*; and, should any important evidence be accidentally wanting on either

side, the party so deficient must suffer the consequences without remedy of any kind, there being no mode of redress for such an occurrence, unless payment of the whole costs and postponement of the trial, though it is known daily to happen. Of what benefit can it be to drag twelve men from their respective callings, and detain them for one or more days, merely to determine whether so many bales of cotton were sold for L.100 or L.150, or whether they were transferred from A to B at the date of an insolvency; or whether so many cattle were actually sold and delivered by C to D, or are the property of D or E? These are questions which do not concern the community at large, politically or otherwise; and it is believed that every private party in a suit, without exception, would infinitely prefer one or more judges leisurely and thoroughly to investigate and decide such questions, independently of the fact, that the expense of summoning a jury may be greater than the value at issue.

Again, as regards the capability to determine, a serious objection presents itself to the most superficial observer. The determination of facts depends not only upon habits of investigation, but upon certain rules which constitute a department of the system of law; and therefore the power rightly to determine must of necessity rest with the judge alone. It is obvious, accordingly, that juries must take their directions from the judge in order to their arriving at a true result; yet, by a practical absurdity, while the judge directs them, they have the power to disregard that direction, and adopt their own views, however much influenced by any particular feeling, and however inconsistent with legal principles or the rules of evidence.

Trial by jury was first introduced into France by the Emperor Napoleon—a remarkable act on the part of a despotic monarch—though the French nation, like many other countries, perceiving the uncertain results to which it would lead, did not desire such an institution. At the time of its introduction, it was much disapproved of, and up to the present time it is extremely unpopular.

After the introduction of jury practice to France, several other continental countries proposed the experiment of trying it, but in general it has been disapproved of. The Canton de Vaux appointed commissioners to consider the expediency of its introduction to their canton; but these commissioners returned a report disapproving entirely of the measure, with the exception of one of the commissioners, who dissented. The measure was afterwards discussed in their Legislative Assembly, and rejected by a large majority.

Jury trial in civil causes was introduced in Scotland in 1815, but in the face of a powerful opposition by a large portion of the most eminent men in the profession. It has now existed for upwards of forty years, and has continued unpopular with the great body of the public. This is evinced by the statistics of the law courts. These show that the number of causes in the Supreme Court have been

argely diminished, while the number of proofs taken—or, in other words, the number of jury trials—is so insignificant, as to demonstrate that this institution nearly constitutes, in public opinion, a denial of justice. The average number of proofs—that is, jury trials—throughout the year, for many years, seldom exceeded thirty or forty; while it will be seen that a vast number of causes, after arriving at the stage for issues, have been either settled by compromise, referred to arbitration, or abandoned in disgust by one or other of the parties.

So strongly has the inexpediency of juries been felt, that in a valuable statute lately passed, under the auspices of a late eminent and Advocate (13 and 14 Vict., c. 36), a power has been conferred, with consent of the parties, on the Lord Ordinary, to try issues without a jury, and pronounce the findings in point of fact, and to take certain portions of the proof on commission in place of remit to the Jury Court. This statute applies to all cases except questions of calumny, and one or two others which are excluded from its operation, and is now largely taken advantage of. Another road has been made by the Act 10 and 11 Vict., c. 47, which entirely abolishes the use of juries in the service of heirs.

Whether we consider the question of expediency of this mode of trial, either as regards the fitness of the parties by whom the facts of case are to be ascertained—the despatch, so destructive of accuracy, with which they are called upon to determine—or the complication of the subject to be determined, and its consequent unfitness for such a tribunal—we can hardly fail to arrive at the conclusion, which the statistics already referred to demonstrate to be in accordance with the opinion of the public at large, namely, that such a mode of trial is calculated in innumerable instances to perpetrate an egregious wrong.

To an unprejudiced mind, it can hardly ever be made obvious, that twelve men unaccustomed to weigh evidence, or to balance contradictions, should be better able to form a just estimate of a complicated proof, than judges who have passed their lives in the study of such cases, and have been promoted to eminent stations for their proficiency in that study. If any advantage can be traced to jury trial at all, it can only be from the simple fact of the witnesses being examined in presence of the judge, and not from the presence of the twelve slow men who are interposed between the witnesses and the Court. That it is a machinery always liable to miscarriage, appears too evident from the numerous provisions that have been found necessary to get the better of their errors. The Writ of Attaint, the motion for a New Trial, the Bill of Exceptions, and the Pleas in arrest of judgment, are all emphatic proofs of this. Is it not notorious in daily practice that numerous cases, after all the expenses of trial are incurred, and issue joined, purely from the impossibility of having them correctly tried by a jury, are submitted to arbitration? The Court of Chancery (notwithstanding the anti-

quoted tediousness of some of its forms), the most important, and, so far as regards the determination of facts upon evidence, by far the most correct tribunal in England, has no juries. Many practical men will admit the accuracy of one of the profoundest law reformers in modern times (Mr Jeremy Bentham), that "trial by jury is an institution admirable for barbarous times, not fit for an enlightened age, though it may perhaps be necessary," he adds, "as matters stand in England." In like manner, the present eminent Chief Justice of England has recorded his opinion, that the introduction of trial by jury in civil causes to Scotland was a mistake. While his Lordship bears testimony to the system working better in England, where, from long-continued usage, it has become adapted and moulded to the frame of English law, he adds, in expressing surprise at Lord Eldon's support of the Jury Bill for Scotland, "There might have been a misgiving that the reformation, however plausible, would produce confusion in practice, and occasion much expense and vexation to the suitors. A better plan probably would have been—separating the law from the facts upon the record—still to have reserved the decision of disputed facts for the Court, and to have improved the manner of taking the written depositions, or to have examined the witnesses in Court *viva voce*." His Lordship again adds, "The measure was without difficulty carried through Parliament; but the expectations entertained from it have by no means been realised, and before long this new system must either be abolished or reformed."—(*Lives of the Chancellors*, vol. vii., p. 312.)

The power vested in the judges to grant a new trial proves at once the inconsistency and impracticability of the jury system. If the Court can determine whether a jury were right or wrong, why does not that Court itself determine the issue in the first instance, and thus supersede a series of essays to arrive at a proper conclusion, each doubling the costs to the unfortunate parties? Everybody is familiar with the noted case of *Robertson v. Barclay Allardice* (House of Peers, 8th April 1830, 4 W. S., p. 102). In that case, which was a prosecution against two justices of the peace, on account of alleged defamatory language employed by them while giving judgment from the bench, the jury returned a verdict for the pursuer, awarding damages against both defenders. Upon motion by the latter, the Court allowed a new trial. The jury, upon the second trial, again gave a verdict for the pursuer. The Court, upon a new motion, a second time allowed a new trial. The jury, at the third trial, once more returned a verdict for the pursuer. The Court of Session, upon a renewed application for a third trial, refused to allow it; but on an appeal to the House of Peers, the Court of Session's judgment was altered, and the motion for another trial not only granted, but such findings with reference to the facts of the case pronounced as virtually to supersede any further jury proceedings.

Many other cases of a similar nature might be cited, but the provision of the Court of Session Act of 1850, allowing issues to be tried by the Lord Ordinary, of consent, without a jury, has been so completely successful, that any argument in favour of its extension seems superfluous, thus enabling a perverse litigant to defeat justice by the delays, the expense, and the entanglements of the system. Sect. 46 requires the consent of *both* parties in order to a jury being dispensed with; the privilege should be granted on the application of *either* party. Were this amendment made on this branch of our process, juries in civil causes would soon become an obsolete institution.

THE PROTECTION OF PUBLIC OFFICERS IN ACTIONS
EX DELICTO.

A VALUABLE authority on this important point, is the case of *Christie v. Thomson*, recently decided by the whole Court. Availing ourselves of the authorities there collected, and the principles stated, it may not be uninteresting to examine the footing on which this interesting branch of law now stands.

In general, every person who suffers by the wrongful or tortious act of another, is entitled to redress, on proof of the injury; *i.e.*, the invasion of some legal right recognised by law. The existence of evil intention on the part of the person charged is immaterial, save when the object is to make him liable *criminaliter* for his act. To found liability in civil consequences, intention is wholly beside the question—the only matter for inquiry being, whether the injury complained of has been caused by his rashness, negligence, or a course of conduct which might have been avoided. But there are certain cases which considerations of public policy have taken out of the general rule. As necessary to the free and impartial administration of justice, the judges of the Supreme Court have an absolute immunity from the consequences of any errors committed by them in the discharge of their judicial functions. “In the imperfection of human nature,” says Lord Tenterden, “it is better that an individual should occasionally suffer a wrong, than that the course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another thing; so, also, are neglect of duty and misconduct.” But in all other cases, Supreme Judges have an absolute protection—a protection which, says Lord Giffard, they cannot reject. “It was not given to them for their benefit, but to prevent the administration of justice from being degraded, and to prevent angry feelings from arising amongst the members of a court, from

co-ordinate magistrates judging each other.”—(*Haggart v. Hope*, 2 S. Ap. 125.)

For like reasons of public expediency, the law affords a more limited protection to inferior magistrates, public functionaries, and persons engaged in a public duty. These, it declares, shall not be liable for the consequences of any act done in the necessary discharge of their duty, unless it has arisen from an injurious motive, and has proceeded on plainly insufficient grounds. In other words, the additional burden is thrown on the pursuer, of proving “malice” and “want of probable cause.” The legal signification of these two expressions should be clearly understood. Malice is a *malus animus*, an improper or indirect motive. “It is not confined,” says Lord Campbell, “to personal spite against individuals, but consists in a conscious violation of the law, to the prejudice of another.”—(9 C. and F. 321.) Certain illegal acts are always presumed to have been done maliciously. An unprovoked blow, for example, is done of malice, because the consequences must have been in the mind of the assailant at the time. Expressions, in order to be libellous, must be both false and malicious; but the malice need not be expressly proved, where the natural tendency and import of the language used is to defame another. Therefore, if you traduce a man, whether you know him or not, and whether you intend to do him an injury or not, the law considers it as done of malice, because it is wrongful and intentional; and it equally works an injury, whether it was meant to produce an injury or not.—(*Broom’s Coms.* 738.) These are examples of legal malice, or malice in law. “Malice in fact” is either personal spite against an individual, provable by the employment of certain expressions or particular line of conduct, etc.; or it consists of a general disregard of the right consideration due to all mankind, not perhaps directed against any one specially, but injurious to a particular individual. In other words, evidence is admissible to prove some act, not perhaps directed against the complainer individually, but of a kind from which a jury would be justified in inferring the existence of a malicious motive. In the latter sense, malice in fact is scarcely recognisable from malice in law.

“Probable cause” means reasons sufficient to satisfy any reasonable person. An act done without reasonable and probable cause differs from a malicious proceeding in this, that while, from the want of probable cause, malice may be, and most commonly is implied, the want of probable cause cannot be implied even from the most express malice. “A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he readily believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action.”—(*Johnstone v. Truelove*, 1 T. R. 544.) “In every action for malicious prosecution or arrest,” says Park, J., “the plaintiff must prove that it was malicious, and without reasonable or probable cause. If there be

asonable or probable cause, no malice, however distinctly proved, will make the defendant liable; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved."—(*Mitchell v. Jenkins*, 5 B. and Ad. 594.) "It is true," says Tindal, C. J., "that, in order to support such an action, there must be a concurrence of malice in the defendant, and a want of probable cause. Malice alone is not sufficient, because a person motivated by the plainest malice, may, nevertheless, have a justifiable reason for prosecution. On the other hand, the substantiating the accusation is not essential to exonerate the accused from liability in an action; for he may have had good reason to make the charge, and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law, therefore, only renders him responsible where malice is combined with want of probable cause. What shall amount to such a combination of malice and want of probable cause, is so much a matter of fact in each individual case, as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy any reasonable man, that the accused had no ground for proceeding *but his desire to injure the accused*."—*Williams*, 6 Bing. 186.)

The doctrine, that malice must be proved in an action of damages against an officer for a thing done in the execution of duty, has been applied to functionaries of almost every class, and is illustrated by a multitude of decisions. The cases, however, may be ranged under two distinct heads—the first, where a party is *bound* to speak or act in the performance of a public duty; the second, where a party commences a proceeding of his own mere motion, and in the character of a volunteer. The first have been called cases where the defender has *protection*; the second, where he has *privilege*.—(Per Lord Justice-Clerk, in *Hamilton v. Anderson*, 18 D. B. 1013.)

With regard to the first class, where the thing done or spoken occurs in the performance of a legal duty which the defender is bound to perform, the *occasion*, though it may not operate as a complete bar to the action, does unquestionably operate in the nature of a defence, and constitutes a *prima facie* justification. In such cases, the malice of the defender is immaterial, if he had probable cause; and though probable cause be wanting, yet, unless there be malice, there is no ground for an action of damages.

With regard to the second class, the rule is, that wherever a person acts or speaks on an occasion and under circumstances which the law regards as privileged—that is, where the thing is done or spoken in the *bona fide* discharge of some legal or moral duty to society; nay, even in some cases (as in the use of arrestments), in the fair and honest prosecution of the rights of the party himself—an action of damages will fail, unless it be established that the

defender used the occasion as a colour and pretext for venting his malice.

The cases of sheriffs, magistrates, and justices of the peace, and witnesses in a court of justice, fall under the first of these classes, while actions of damages against fiscals, superintendents of police, private prosecutors, and persons who have used arrestments on the dependence of an action, fall within the second. The first class have the matter brought before them, and are compelled to speak and to act at the instigation of others. The second only are set in motion at their own will, either from their own conceptions of public duty, or in the voluntary prosecution of private rights.

1. In the case of justices and other inferior magistrates, the ordinary common law protection has been extended by special statute. The 43 Geo. III., c. 141, provides that, in all actions against justices of the peace on account of any conviction made by them, or by reason of any act done or commanded by them, in case such conviction shall have been quashed, the pursuers shall not be entitled to recover any greater damage than *twopence*, nor any costs whatever, unless it should be expressly alleged that the justices acted maliciously and without any reasonable or probable cause. And it has been observed, the pursuer may make out the malice, and yet fail if he does not prove want of probable cause; for if there is probable cause, the magistrate is protected in whatever situation his mind may be.—(Per L. C. C. Adam, *Horn v. Baird*, 4 Mur. 416.) In such cases, the former practice was for the pursuer to take an issue not disclosing a case of privilege, and for the defender to take a counter issue, as to whether the act complained of was done “in the lawful execution of his duty as a magistrate.” Now, however, the counter issue is no longer necessary. The case goes to trial on the pursuer’s issue; and if it appears to be one of privilege, the judge directs a verdict for the defender, on the ground that there had been no evidence of malice and want of probable cause.—(See *Jamieson v. Main*, 15 Mur. 517.)

The recent case of *Hamilton v. Anderson* (June 18, 1856, 18 D. B. M., p. 1003), which was an action of damages against a sheriff-substitute for suspending a procurator in his court, is only of importance here, as showing that, even though malice and want of probable cause be *generally* averred, that will not be sufficient to subject a judge in damages when he acts within his jurisdiction. In that case it was observed by the Lord Justice-Clerk: “Can that protection be overcome in respect of a general and naked averment of malice? In a case of mere PRIVILEGE, it is enough, in the general case, to aver that the act was done, or the words spoken maliciously, and, in some cases, with the additional averment of want of probable cause. But in a case of protection, such as that which belongs to the proper judicial acts of a sheriff only within his competency, I am very clearly of opinion, that, according to our rules as to pleadings which raise this question on the summons, it will be

necessary, in order to bring out the point whether the protection is absolute, notwithstanding an averment of malice, to set forth a special case, averring previous enmity against the practitioner; such as continued and marked rudeness towards him; outbreaks of temper, directed against him specially and alone; private quarrels, either on personal grounds or patrimonial interests; previous personal and indecorous rebukes, and the like—such as to substantiate malice on the face of the record if the facts are proved, and to show that the act was the result of special malice, under the cloak and pretext of judicial authority."

2. A similar protection is accorded to fiscals, police officers, etc., who, as charged with the maintenance of the public safety and good order, are protected against the consequences of innocent mistakes in the discharge of their public duty. In the case of *Monro v. Taylor* (25th Feb. 1845, 7 D. 500), an action of damages was brought against a procurator-fiscal, on the ground that he had applied for and obtained a warrant of apprehension against the pursuer without sufficient ground or probable cause, and that, in the course of executing the warrant, the officers to whom he had committed that duty had imprisoned the pursuer in a bank safe, in a cruel and oppressive manner. In regard to the obtaining of the warrant, the Court held the action irrelevant, in respect that malice was not alleged; and this doctrine was considered to be so clear, as to be scarcely contested by the pursuer of the action. It was held to be fixed by the case of *Arbuckle*. The procurator-fiscal was held to be privileged, as being, in the words of Lord Cockburn, "a public officer acting for the public interest."

In an action against a superintendent of police, the issue sent for trial was one which did not put in issue malice and want of probable cause, but used words which sufficiently protected the defenders. The act complained of was an illegal search, apprehension, and imprisonment; and the issue sent for trial was, "whether the defender, from *wilful oppression* or *culpable negligence*, out of which real injury has arisen to the pursuer, wrongfully," etc.

The case of presbyteries who institute proceedings by libel falls within this category. No doubt they also occupy the somewhat inconsistent position of being judges, at least in the first instances, in the cases which they bring before themselves as prosecutors. But the possession of the two characters will not relieve them of any responsibility which attaches to them in one. In the case of *Dunbar* against the Presbytery of Auchterarder, an action of damages was brought against a presbytery in the following circumstances:—"By the Schoolmasters' Act, 43 Geo. III., c. 56, presbyteries are authorised, upon a complaint being made to them against a schoolmaster by the heritors, minister, or elders of a parish, to serve the schoolmaster with a libel, to take proof thereof, and pronounce sentence of deposition or otherwise (without appeal), as they should think fit.

A presbytery having served a schoolmaster with a libel, found it proven, and deposed him from his office. Their sentence was afterwards reduced, upon technical irregularities in taking down the proof. Held, in an action of damages at the schoolmaster's instance against the presbytery, on the ground of these proceedings, that they were entitled to plead privilege; and therefore the action dismissed, in respect malice and want of probable cause were not libelled."

In this case it was averred by the pursuer, that, when a complaint against him was laid before the presbytery, they at once proceeded to serve him with a libel, without making any previous investigation, which, if made, would have shown that there was not the least foundation for the charge. As prosecutors, therefore, they were guilty of gross neglect of duty, because, although authorised to proceed by libel, on such complaint being made to them, they were not bound to do so if they considered it unfounded. They were therefore liable in damages, more especially as their proceedings were set aside on informalities. The Court, however, dismissed the action as irrelevant, from the want of the indispensable averments of malice and want of probable cause.

In a previous case, which was an action of damages against a presbytery of Seceders, who had prosecuted and deposed one of their number, "the judges were generally of opinion that the defenders were answerable, if it could be shown that, though made in a judicial form, the charge against the pursuer was truly a calumny, and was made and prosecuted in a malicious spirit."—(*Auchincloss v. Black*, March 6, 1793, Hume, p. 595.)

Coming from the case of public officers acting for the public interest to the cases of private citizens, it will be found that, wherever they do nothing more than appeal to the constituted authorities, by giving information of suspected offences, which turns out to be unfounded, or where they institute prosecutions themselves, which end by acquittal of the accused, or use arrestments on the dependence of actions for the protection of their own civil interests, which are ultimately dismissed, the mere want of success is not of itself a ground of action.

The leading case in this branch of the law is *Arbuckle v. Taylor*. It is too well known to require any detailed statement here. The case was one for damages against a private party, and against the procurator-fiscal and the sheriff-substitute, for injuries sustained in consequence of an unwarranted prosecution for theft. It is unnecessary to mention in what way the case was disposed of, so far as regards the sheriff-substitute and the fiscal. With regard to the private prosecutor Taylor, Lord Eldon said: "My judgment certainly, as an English judge, would be conformable to the judgment of the Court of Session, that he also ought to be assoilized, not because I think Arbuckle guilty, or that he is otherwise than innocent, or that he would not turn out to be innocent if the case were

ted to the bottom, but because, on English principle, such an action could not be maintained, unless the prosecutor had acted maliciously and without probable cause. I think, under the circumstances, it cannot be justly said that there was not probable cause to accuse; and, indeed, Arbuckle himself has so far given evidence against himself, that he threatened the same accusation against the other, if they turned out to be his property; and I cannot say that the circumstances do not amount to a probable cause of inquiry and investigation carried on under the form of accusation." So also, in the case of *Shepherd v. Fraser* (Jan. 26, 1849, D., p. 446), a "summons of damages against a party for having caused the pursuer to be apprehended by a constable on a criminal charge, and having thereafter given intimation of the charge to the procurator-fiscal," was "held not to be relevant without an averment of malice and want of probable cause."

The same doctrine has been followed by the First Division; see *Millender v. Milligan*, and *M'Pherson v. Cattinach* (June 20, 1849, 11 D., p. 1174; Dec. 10, 1850, 13 D., p. 287). In the case of *Cameron v. Hamilton* (Feb. 1, 1856, 18 D. B. M. 423), the facts were, that "a collector of water-rates brought an action of damages in the Sheriff Court against a shopkeeper. So far as laid on the ground that the shopkeeper had 'groundlessly and maliciously' accused him of fraud, by obtaining money to which he had no right, and had committed him to the custody of a police officer, by whom he was taken to the police office, when the charge was related, but dismissed, *Held*—that the summons disclosed a case of privilege, and that an averment of want of probable cause was essential; that 'groundlessly' was not equivalent to 'want of probable cause;' and in respect there was no such averment, action dismissed."

"In so far," said the Lord President, "as the action is founded on the charge of fraud made to the police officer, and the requiring the pursuer to be apprehended and taken to the police office, and the repetition of the charge of fraud there, the summons is, I think, sufficiently explicit. But I am of opinion that that charge, as set forth, raises on the face of it a case of privilege to the defender. I am also of opinion—and that must now be held to be decided in more than one case, and especially in the case of *Dallas v. Mann* (4th June 1853, 15 D. B. M., p. 746)—that where privilege, on the part of the defender, appears from the nature of the case, as stated by the pursuer, in such a case the pursuer must allege want of probable cause. The question is not one of proof, but of pleading before proof. It is not a matter to be left over until it shall appear, in the course of the proof, whether it really is a case of privilege. If the case, as stated in the summons, is one of this class, the want of probable cause, being one of the essentials of the action, must be stated in the summons. Now, this summons does not contain any allegation of want of probable cause. I cannot take the word

'groundless' as a substitute. It will not do to introduce *equivocues* of that kind. Therefore I think this summons is defective in this respect, and just as defective as the summons was in the case of Mann."

As illustrative of the same principle, and explanatory of what constitutes "reasonable and probable cause," we may here refer to a case decided the other day by the English Court of Exchequer.—(*Hogg v. Ward*, 26th May 1858, 5 W. R. 595.) It was an action for assault and false imprisonment against a policeman, and in the following circumstances :—

In the month of August, one Johnson, who travelled about the country, attending fairs with a swing, addressing the defendant, told him that, about a year before, he had been robbed at a fair of some rope traces, that he identified them on the horse of the plaintiff, that they had been stolen, and that he desired he should take the plaintiff into custody. The plaintiff was a butcher, having a shop in the neighbourhood, where he had resided for some twenty-five years ; and he was known to the defendant, who was also acquainted with his address. At the time the charge was made, the plaintiff was with his horse and cart. The defendant asked the plaintiff how he had come by the traces. He said, some months before he had bought them of a man for a shilling, who said he had picked them up on the road, and that he, the plaintiff, had told the man, that if any one should inquire after them, he might have them by applying to him. The defendant thereupon took the plaintiff into custody, and locked him up ; and he was imprisoned until the next day, when he was taken before a magistrate, who dismissed the charge.

These facts, the Court were unanimously of opinion, did not disclose a reasonable charge and suspicion sufficient to justify the policeman in doing what he did. "I entertain no doubt," said Watson, B., "upon the point of law, that a constable is justified in arresting upon a charge of felony advanced by one person against another, provided the charge be reasonable, but not otherwise. A charge may be unreasonable either in the nature of the charge relative to the person against whom it is made, or as coming from the person who makes it. For example, if an idiot were to charge another with felony, the simple fact of the charge being made, would not render it reasonable for the constable to arrest ; so Lord Ellenborough held that the charge of being a receiver of stolen goods coming from the lips of the thief was not a reasonable charge. This case is one of the highest moment, since, on the one hand, it is of great importance that constables should be protected in the execution of their office ; and, on the other hand, individuals must be protected against being subject to be arrested and carried to prison on any extravagant charge of felony that may be made by any person. It is unnecessary to say whether the question is one of fact or law. It is enough to dispose of this rule to say, without repeating the facts, that they satisfy my mind that the charge was an unreasonable charge, and one upon which the constable had no right to make the arrest."

Other illustrations of the rule may be derived from the cases

applicable to arrestments upon depending actions, in regard to which it is now settled, that, though the action fail, the pursuer, who used the arrestments on the dependence, is not liable in damages unless there be malice and want of probable cause. "The distinction," said the Lord Justice-Clerk, "is quite plain between the cases where it is sufficient to prove malice, and those where want of probable cause must also be proved, and was laid down long ago by Lord Eldon in the case of *Arbuckle*. Where a person acts in the exercise of a legal right, and in the ordinary use of legal forms of procedure, and where it is said that he has abused that right, the law holds that malice, or an intention to injure, must be proved, and also that it must be shown that he had no probable cause for what he did. Accordingly, this was the course which was taken in the case of *Hallam v. Gye*. The acts and motives of a litigant are not to be too strictly scrutinised, otherwise the effect would be to deter parties from coming to the Court to take advantage of what are their legal remedies."—(*Brodie v. Young*, Feb. 19, 1851, 13 D., p. 737; *Haining v. Hewetson*, Feb. 12, 1842, 14 D., p. 487.)

The recent case of *Christie v. Thomson* arose out of a seizure, by the defender, a tide-surveyor at Leith, of a quantity of tobacco of the pursuer's own manufacture, in the belief that it was foreign and liable in duty. On the mistake being discovered, the tobacco was returned; and the question was, whether, admitting the conduct of the defender to have been illegal, the pursuer must fail in recovering damages unless he should succeed in showing that the defender acted maliciously and without probable cause. The judges differed on the point, but the opinion of the majority was to the following effect:—

We are of opinion that neither the element of malice nor that of want of probable cause should be inserted in the issue for the trial of this cause.

It is quite settled that, by having introduced those elements into his summons and record, the pursuer is not bound to insert them in his issue, if they are not necessary to his action.

We consider that the Customs Consolidation Act referred to in the proceedings fixes the position and the powers and privileges of officers of the Customs in the matter in question, and that the procedure must be determined by that Act.

The defender, in making the seizure here complained of, had no special warrant to seize these special goods. He acted on the warrant contained in the statute, which entitled him, when he had the writ of assistance, to enter any premises, "and seize and bring away any uncustomed or prohibited goods." He entered the premises of the pursuer and seized the tobacco in question. If that tobacco was not uncustomed or prohibited, the seizure was unwarrantable, and this is consequently the main point involved in the case.

That a party authorised merely to seize smuggled goods is not thereby authorised to seize goods *not* smuggled, seems clear; and such an unauthorised seizure is a wrongful act, for which redress must be due, unless it be in some way excluded. But the Customs Consolidation Act gives one protection which is of great importance. By the 312th section it enacts that, in case any action shall be brought to trial on account of any seizure, "and a verdict shall be given for the plaintiff, if the Court or judge, etc., shall certify on the record,

etc., that there was probable cause for such seizure, then the plaintiff shall not be entitled to more than twopence damages, nor to any costs."

This provision seems plain, and affords a valuable protection to officers of this class; but it is the only protection of the kind which the statute appears to give. It will be observed that, even when the judge certifies that there was probable cause, the ground of action is held to remain, and the verdict stands for the plaintiff, so that judgment may be given for him, but the damages are limited to a nominal sum, and costs are refused.

The statute nowhere declares or indicates that *bona fides*, without probable cause, shall be also a protection, whether as ascertained by the judge or by the jury. It nowhere says or seems to imply that malice must be proved by the pursuer.

The machinery provided by the 312th section seems to make it clear that the element of *want of probable cause* is not to enter the issue. It would be anomalous and absurd to suppose that an issue, containing the element of want of probable cause, is first to be tried, and then, that after an affirmative verdict is returned, the judge is to certify the opposite of that part of the verdict.

This consideration, of itself, seems strongly to support the view that the element of malice should in like manner not enter the issue. It would be anomalous and, we think, unprecedented, that malice should be put in issue without also putting in issue want of probable cause.

But, generally speaking, we find no grounds for inferring that a pursuer in such circumstances is bound to prove more than that the seizure of his goods was an unauthorised seizure. If he succeeds in that, it lies with the defender to prove some excuse, and we see no other such defence competent to him than the one provided by the 312th section, which seems to be reasonable and ample. Where a revenue officer makes a wrongful seizure, it seems fair to say that if he had probable cause he shall be protected; but that if he had no probable cause, he shall be subjected in reparation.

We do not consider that any question here arises as to common law. We do not clearly see how any principles of common law can extend to officers of customs, who are entirely the creatures of statute, and as to whom the whole statutory law is to be found in this Consolidation Act. Such revenue officers are not officers of the law, properly so called. They are not magistrates or judges, or the servants or executors of magistrates or judges, acting under magisterial or judicial warrants. They act under statutory warrants, which, if they transgress, leave them no excuse or protection except what the statute may further provide. They act under general warrants which the common law does not recognise, but regards as an invasion of the liberty of the subject. This generality is so far modified by certain provisions, but yet their only warrant in this matter is to seize goods *de facto* smuggled. No common law warrant or proceeding of a similar kind is in ordinary use, and we can discover no precedent or principle for holding that a revenue officer so seizing goods *when they are not seizable, and when he has no probable cause for seizing them*, should not be liable in reparation, whether he was actuated by malice or not. This is not an action on account of the use of words, or of judicial proceedings: it is an action for an invasion of the right of property, which is quite a different matter. Even as to officers whose powers depend more on common law than on statute, it required statutory protection to save them from the consequences of error; and by the statutes on that subject malice is expressly required as an element in the pursuer's case, as well as want of probable cause, which is in direct contrast to the statute here in question.

The course then to be taken here, in our opinion, is, that the issue shall merely put in question the fact of wrongful or illegal seizure; that if the jury return a verdict for the pursuer, they may, and should, at the same time, assess the damages according to their estimation, but that, thereafter, the judge, if he think right, shall certify on the verdict or record that there was probable cause for the seizure, which, on applying the verdict, will have the effect of cutting down the damages to twopence, and disallowing the costs.

LIABILITY OF LAW AGENTS.

A CASE was decided by the Second Division of the Court, during the past session, as to the liability of agents for negligence and unskilfulness, which would seem to extend their responsibility farther than it has hitherto been carried. Before inquiring whether the judgment be well-founded or not, it may be proper to ascertain the current of the previous cases on this subject.

The general rule of law, that an agent is responsible for professional skill, has been uniformly maintained by the Court; but, as the application of it to particular circumstances raises a question only of degree, it is not extraordinary that there should be a difficulty in reconciling the decisions on the point. It is quite fair to hold a law agent bound to exercise a reasonable degree of care, skill, and attention in conducting the business entrusted to him, and to attach personal liability to him for *crassa negligentia*; yet, what ought to be considered unskilfulness and what gross negligence, may give rise to very nice questions of law. In *locatio operarum*, under which this relationship properly falls, it is not necessary that a person acting for another in any sphere should bring the highest talent and skill into operation. A surgeon does not undertake to cure, nor does an agent undertake to succeed in a suit; it is enough if they use their best ability, without gross dereliction, to do that which they profess. In truth, as was once said by Sir William Jones, there is as much responsibility upon the client in selecting his adviser, as on the party chosen to perform his duty. In illustration of this, he quotes the following case from the Mohammedan law:—"A man who had a disorder in his eyes called on a farrier for a remedy, and he applied to them a medicine commonly used for his patients. The man lost his sight, and brought an action for damages; but the judge said, No action lies, for if the complainant had not himself been an *ass*, he would never have employed a farrier." It does not appear that the pursuer, in the case we are about to consider, deserved to lose it on that ground; for, so far as we can perceive, he selected perfectly competent professional men to do his law business.

There are several leading decisions on the subject, which indicate the kind of negligence and unskilfulness which will render an agent personally responsible to his client in damages. In all of these the inquiry has been, whether the act amounted to *crassa negligentia* or a gross want of skill. The agent was held liable in such circumstances as these: where he was instructed to expedite confirmation, and neglected to do so till after his client's death (*Goldie v. Macdonald*, July 4, 1757, M. 3527), or prepare a codicil to a settlement, and failed to have it executed before the death of the testator (*Webster v. Young*, Feb. 20, 1851, 13 D. 752); or where he failed to lodge alimant for a prisoner applying for the Act of Grace, in consequence

of which the debtor was liberated (*Dougan v. Smith*, July 3, 1817, F.C.), or neglected to intimate an assignment of a security (*Lillie v. Macdonald*, Dec. 3, 1816, F.C.); or when employed to effect a loan on heritable security, and neglected to ascertain that inhibition had been used against the estate (*Campbell v. Clason*, Dec. 20, 1838, 1 D. 270); or where he was instructed to take a security, and executed an heritable bond with only a holding *a me*, but neglected to have the sasine thereon confirmed (*Struthers v. Lang*, Feb. 2, 1826, 4 S. 421); and where he committed an error in an affidavit which prevented the client from opposing the discharge of a bankrupt (*Brown v. Mackie*, June 23, 1852, 14 D. 358); and for loss occasioned by the defective form of a security (*Sim v. Clarke*, Dec. 2, 1831, 10 L. 85).

We may note two considerations which have led the Court to free the agent. These are—(1) where the business was so nice and complicated that the course of procedure was difficult and doubtful (*Grant v. McLeay*, Jan. 1, 1791, Bell's Cases, 319; *McLean v. Grant*, Nov. 15, 1805, M. App. 1, Reparation No. 2); and (2), where the agent had acted under the advice of counsel, though the proceedings adopted were contrary to the special instructions of the client, and were afterwards found to be wrong (*Megget v. Thomson*, Feb. 2, 1827, 5 L. 275).

It is unnecessary further to refer to the law of agent and client at present, as we shall have occasion to advert to the nicer questions which have arisen as we proceed to consider the decision to which allusion was made at the outset. It arose out of the following circumstances:—

The pursuer, Smith, who was a farmer in the county of Elgin, employed the defenders, Messrs Grant and Leslie, writers, Elgin, to prosecute four farm-servants before the justices, for breach of contract in respect of desertion. They accordingly presented a complaint, under the Act 4 Geo. IV., c. 34, to the Justice of Peace Court at Elgin, before which the farm-servants were brought, when the following minute was written out:—"Elgin, 16th December 1854.—In presence of Thomas Miln, Esq., William Grant, Esq., and Robert Jeans, Esq., Justices of the Peace for the County of Elgin,—Compeared Alexander French, James Gill, William Murdoch, and James Hendry, who, being interrogated whether or not they are guilty of the offence libelled, they severally answered, that they left Mr Smith's service, but in consequence of having received foul meat made by Mr Smith's cook; and the declarations were taken down apart." Mr Leslie, of the defenders' firm, attended the Court for the pursuer, and wrote a minute withdrawing the charge against the prisoner Hendry. Conviction followed against the other parties, and they were sentenced to be imprisoned for eight days, which was done accordingly. In June 1855, being more than six months after they had undergone imprisonment, they brought a suspension of the sentence in the High Court of Justiciary.

on various grounds, one of which was sustained; and the Court quashed the sentence, "in respect that the declarations of the complainers, on which the conviction bears to have proceeded, were not authenticated by the signature of the justices." Hereupon the farm-servants raised an action, and obtained decree against the pursuer for wages, expenses, and damages. The pursuer then claimed indemnification against his agents, alleging gross negligence and gross unskilfulness on their part, in not seeing that the declarations, as well as the minute quoted above, were properly signed and authenticated by the justices. The defenders objected to the relevancy, and pleaded, that it was not their duty to see to the due authentication by the justices of the declarations of the accused parties, nor to judge of the sufficiency of the evidence or admissions upon which the justices thought proper to convict; and that in the circumstances they could not be held to be guilty of gross negligence or want of skill. The Lord Ordinary (Mackenzie) sustained the defence of irrelevancy; and an extract from the note appended to his interlocutor will show his reasons for doing so. He says,

"With regard to the minute on the petition, it is not a plea of guilty, and the Lord Ordinary is not satisfied that it required to be signed. At all events, it is not pretended that the sentence was quashed by the Court of Justiciary in consequence of the non-authentication of this minute, and it is thought, therefore, no stress can be laid on that circumstance."

"Whether there are sufficient grounds set forth for holding the defenders responsible for omitting to see the declarations authenticated by the justices, is a question of more difficulty. The pursuer has not distinctly averred, that it was the duty of the defenders to get the declaration signed by the justices, and that they neglected that duty. This was a proper part of the judicial proceedings at the trial, which was under the control and direction of the justices and the clerk of the peace. It was the duty of the justices to sign the declarations, and of the clerk of court to see this done. The declarations were written on a paper apart, and it is not alleged that they were delivered up to the defenders so as to afford them an opportunity of discovering the defect before the sentence was put in execution. Although law agents may be liable for gross negligence in things falling within the scope of their own duty, it does not follow that they should be held responsible for overlooking, or failing to correct, errors or omissions by judges or clerks of court in matters of law specially entrusted to them."

The case being brought before the Second Division, on a reclaiming note for the pursuer, the Court unanimously reversed the judgment.

The late Lord Justice-Clerk stated his views very fully, but we shall only give an outline of his judgment. He entertained the opinion, that this was a case of direct liability against the agents whom the pursuer employed, for want of attention and of skill in conducting the proceedings. The employment was to manage and conduct a business of a kind most perilous to the client, if there was anything irregular in the proceedings, namely, to carry through a prosecution which was to end in the personal punishment of the parties against whom it was directed. His Lordship said he could not conceive a clearer case. Whatever proceedings related to the personal liberty of the subject, had always been viewed with the most scrupu-

lous and rigid jealousy by the Court ; and the cases which had so frequently occurred where sentences had been set aside through blunders in the prosecution, formed a significant warning to the agents to be most careful and attentive to see that the forms necessary to the validity of the conviction had been duly complied with. And it was notorious that these proceedings, being taken before justices of the peace, required the utmost vigilance to see that they were kept right. These judges were men who had usually no skill in matters of form, and their clerks were often not much better. The duty of the defenders was that of paid agents ; and in return for payment, the client was entitled to expect full protection from any liability caused by the carelessness or want of skill on the part of the agent. It might be that the best qualified agents for conducting such proceedings were not those who had the highest standing in the profession ; but, if so, such agents should not undertake cases of the kind. Such cases required professional skill of the highest kind, and the agents were bound to supply that skill. In this case, the blunder arose from careless inattention to the proceedings. The thing to be done was to hand the document to the justices to be authenticated by their signature. The agent was bound to watch to see that that was done. It was a thing which took place under his eyes ; and he could not be ignorant, if he had attended to his duty, that the paper was not handed up for signature. Any bystander could see that ; and it was, therefore, an inexcusable neglect, unless the agent did not know that such was required, in which case he was responsible for want of due knowledge of his business. Agents were bound to examine the proceedings to see that there was no omission. It was not necessary to establish gross negligence or want of skill in order to render the defenders liable. but there was a great want of professional skill exhibited by them in this case.

Such were the principal reasons stated by the late Lord Justice-Clerk for giving judgment against the agents in this case, in which the other judges concurred. In the first place, it was never questioned who were *primarily* to blame for the irregularity in the conviction. It was not the agents, but the justices or their clerk. The declarations were entirely *judicial* documents, over which an agent had no more control than he could have over the notes of evidence taken by the presiding judge in the High Court. The blunder was not, therefore, committed either by the agents themselves, or by those for whom he was responsible in the sense of being employed by them ; the neglect was that of a petty court, armed with special powers by Act of Parliament. On what principle of law or equity, then, should an agent be rendered responsible for the error of a public functionary ?

The most analogous class of cases are those where agents have been held liable for the errors of messengers-at-arms employed by them. These, however, were rested on the principle, *qui facit per*

um facit per se; and when this principle was first stretched so as to apply to such cases, it was done contrary to the opinion of a majority of the Court, and with great hesitation; but, as Fountain-ll reports, "the *new decision* was looked on as necessary to cause men in public offices look better to the discharge of their duty, that delieges do not suffer by their carelessness and sloth, to give it no other name" (*Wood v. Fullarton*, Nov. 29, 1710, M. 13962). The application of liability to the agent in that manner was considered hard enough, because messengers were appointed by the court to do that which did not properly fall within the subject of the agent's employment; but in nearly all the instances of it on record, there was something to connect the agent with the messenger's blunder. For example, in the last case referred to, the error consisted in the messenger denouncing before the expiration of the writ of charge. The agent had an opportunity of seeing this before registering the denunciation and writing out the caption which flowed upon it; hence it was considered to be personal neglect. The same remark applies to other cases (*Elliot v. Romanes*, No. 8, Hume; *Hamilton v. Fraser*, Feb. 14, 1817, F.C.).

Lord Cowan likened the case of *Smith v. Grant and Leslie* to that of an agent doing diligence upon an informal or defective writ, when, as appears from many of the precedents referred to, he is not liable. But the cases are not parallel. In that supposed, the writ or warrant bears the defect or vitiation palpably on its face, and the agent has an opportunity of seeing it before doing execution; while in the one before us the proceedings were *ex facie* regular, and the writ which bore the invalidity never passed into the agents' hands at all. His Lordship, however, put another hypothesis, and I agree with him that it is in point, although arriving at a different result on the law, viz:—An agent obtaining from the Clerk of Court an extract of an interlocutor (which had not been signed), and doing diligence upon it, would he not be liable? This is just the question we are dealing with; and the fact, that agents are daily in the habit of assuming that principal interlocutors are properly signed without seeing them, renders this decision of the utmost importance to them.

We proceed, then, to inquire whether the agents performed their whole duty in the business entrusted to them. It is laid down by an institutional writer (*Bell's Com., Shaw's Ed., 1 v., 149*), "where the person is employed in his proper professional character, and a specific act is ordered to be done, it must be done according to rule; neither neglected nor unskilfully performed." And he goes on to say, that although the act or business is not settled by a fixed and unquestionable rule, he must follow the known method. This is no doubt sound law. The best precedent of liability under it, is that where a bill of exchange was put into an agent's hands "for the purpose of doing such diligence as to place the drawer on an equal footing with the other creditors." The other creditors had

used adjudications against the debtor's land estate, which was heavily burdened, but which ultimately produced a considerable reversion, while the agent only inhibited. The defence was, that no precise duty had been prescribed, and the defender could only be liable for extreme negligence, which this was not, as it arose from a desire to save expense. The Court, however, held, that the agent having neither done proper diligence, nor given his client a proper opportunity of judging for himself, was liable for such sum as would have been received had he adjudged (*Mason v. Thom*, Feb. 4, 1787. F.C.).

It is of little consequence, we apprehend, what was the "known method" in such prosecutions as the agents had to deal with. They were employed to prosecute certain parties under a statute. If they deviated from rule, *i.e.*, the provisions of the Act, or, as occurred in one case (*Frame v. Campbell*, June 9, 1836, 14 S. and D., 914), founded upon a wrong section, then the fault would be their own; but if, on the other hand, they carried out the course prescribed by the statute to the letter, surely both in law and in equity they were relieved from blame. And it is of importance to bear in mind the nature of that statute, which provides a *quasi* criminal procedure against workmen for deserting service. In any prosecution under it, the complainer stands in the position of fiscal; for he can have no other object in view than the punishment of a delinquency for the benefit of society. His duty and responsibility would appear alike to cease on giving information to the justices, who are ordained to examine into the nature of the complaint, and to deal accordingly. The Act is entitled, "*An Act to enlarge the powers of justices in determining complaints between masters and servants,*" etc.; and its provision is simply this, that on a complaint upon oath being made to any justice of the peace of the county or place where the servant has been engaged or employed, by the master or mistress, he shall issue a warrant for such servant's apprehension, and "*examine into the nature of the complaint;*" and if it shall appear that the servant has not fulfilled his contract, "*or hath been guilty of any other misconduct or misdemeanour in the execution thereof,*" "*it shall and may be lawful for such justice to commit every such person to the house of correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months,*" etc. The duty of the complainer and the duty of the justices are clearly pointed out; and because the justices were here guilty of a dereliction of their duty, in not authenticating the result of their examination into the nature of the complaint, the agents of the complainer are mulcted in a large sum of damages. The singular thing is, and it is only one of the novel elements introduced into the *ratio decidendi* of the case, that the notoriousness of the ignorance and unskillfulness of justices and their clerks is founded upon to fix the liability on the agents. In this view, it must have been a monstrous mistake of the Legislature to "enlarge the powers" of such notori-

ly stupid and ignorant judges, so as to confer upon them the right of interfering "with the personal liberty of the subject, which always looked upon with the most scrupulous and rigid jealousy of the Court." Can it be maintained for a moment that law agents are to be responsible for the omissions or commissions of any ignorant or unskilful judges, and their equally incapable clerks, whom the government may be pleased to appoint? In short, is it their primary duty to keep such men right? for that is the result that we could be forced to come to. Such a proposition would be so extraordinary, and so much at variance with all the other rules affecting the relationship of agent and client, that we leave it, as being entirely founded in the jurisprudence of this country.

Again, it is said that the employment was to conduct a very arduous piece of business. Does this raise the standard of care and skill that an agent is bound to observe, or does it increase his responsibility? On the contrary, we have, in one of the best considered precedents probably on record, an unqualified repudiation of such a doctrine by the Court of last resort. The Second Division of the Court, in altering the Lord Ordinary's interlocutor (*Landell v. Purves*, May 27, 1842, 4 D. 1300), drew a distinction between the employment of an agent in an ordinary matter of business, and the use of *personal* diligence. Lord Cockburn, who was Ordinary in the case, remarked, "In so far as the agent's responsibility concerned, he saw no ground for any such distinction. Can an agent be required to do more, even in cases of warrants and of personal liberty, than to give his client intelligence and due caution?" The House of Lords answered this question by reversing the judgment of the Court below (10th March 1846, 4 Bell's App. Cases, 100), and affirming Lord Cockburn's opinion. Notwithstanding this result, the soundness of which no one could entertain any doubt, it appears the doctrine was not considered settled in the division of the Court where it had been tried, for the decision in *Smith v. Grant* and *Leslie* was made partly to rest upon it.

But the next consideration is, that Grant and Leslie were "paid agents," and this is stated as a ground for increasing their liability. Now, with the exception of one case (*Murray and Son v. Taylor*, May 15, 1828, 6 S. D., 802), the difference of being paid agents and unpaid agents has never affected the question of their liability. That was an action by bank agents against their notary, for having erroneously dated a protest 31st November—that being an impossible date, when the Court were against entertaining the claim at all, in respect that the pursuers received three-fourths of the charges for protesting, while the notary received only one-fourth. In another case, indeed (*Currie v. Colquhoun*, June 17, 1826, 6 S. D., 17), this element was allowed to come into consideration: the agent who was employed to draw missives of sale omitted to get them tested, and the Court found him liable to indemnify the pursuer against the loss occasioned by the purchaser of the ground

resiling from the bargain, *as he was entitled to make a charge for framing the missive*, and therefore he was answerable for the consequences of neglecting his duty. This precedent, if it is worth anything, has rather a favourable bearing on the case under consideration, for the agents. They were not entitled to make a charge for framing the declarations, and still less for examining whether the materials on which the justices were to decide were sufficient, in point of law and form, to support a conviction. Their position was analogous to that of an agent who gives in a deed to be recorded. He is not entitled to charge for inspecting the register to see that it is correctly recorded; but, on the principle of this novel decision, he might be held responsible for the error of the Registrar. However, it does not seem of any consequence whether the agent is paid or acts gratuitously. It was so held by the House of Lords affirming the decision of the Court of Session (*Donaldson v. Haldane*, June 2, 1837—Aug. 3, 1840, 7 Clark and Finelly, 762). In this case the agent had volunteered his services as a friend, and carried through a loan transaction for the pursuer gratuitously; but this did not relieve him of the responsibility to see that the titles to the security were unobjectionable, and he was ordained to make good a loss of L.2000! Other cases are reported of a similar description, so that the law is quite settled, that gratuitous service does not free an agent of liability. The fact of Messrs Grant and Leslie being paid agents, did not, therefore, increase their responsibility to their client, who, in order to have succeeded in a claim of damage against them, ought to have averred and established circumstances amounting to gross negligence and want of skill (*Cooke v. Falconer's Representatives*, Nov. 26, 1850, 13 D. 157; and *Train v. Carlaw*, Feb. 20, 1846, 18 Jurist 258). This has been authoritatively fixed in law; and yet, singular enough, it was announced from the Bench that such was unnecessary, just as had been done in *Purves v. Landell* (above referred to), where the mere allegation of nullity of the agent's proceedings was sustained, to support a claim against him; but, on appeal, when reversing that judgment, Lords Brougham and Campbell deprecated such a doctrine in the strongest possible manner, observing, that however nice or hazardous the legal business might be for which the agent was employed, the error or mismanagement must be *gross*, and the allegations required to be to that effect, otherwise the law held that the agent was not culpable.

The dereliction of the justices in the present instance, consisted in committing to prison certain persons upon defective and insufficient evidence. Their duty was to inquire into the nature of the complaint, which they did by taking declarations from the prisoners; and without authenticating these declarations, they convicted. The evidence was defective because of that omission. It was no part of the agent's duty to deal with that evidence. They might have had fifty witnesses in attendance, but the justices were satisfied with what they had got. It would have been easy for Grant and Leslie

have shown, that even if the declarations had been signed, the conviction was bad; but that was not a relevant defence. This was early stated by Lord Curriehill in a recent case (*Davidson v. Mackenzie*, Dec. 20, 1856, 19 D. 236; p. 252), "According to the opinion of President Blair, concurred in by the Court in the case of *Chatto*, 17th Jan. 1811, F. C., and followed in the case of *Millan*, 2d March 1820, F. C., it was held, that defences of this nature were irrelevant in answer to a demand of damages, for a breach of duty by a public officer or law agent, in respect of the impracticability of ascertaining that if such duty had been performed, any other objections to the diligence would have been successful, or would ever have been urged or persisted in." We quote this passage as showing the reason why the Court generally refuses to give effect to such a defence. But it does not apply in this instance, for the Court could have no difficulty in pronouncing the conviction bad *ab initio*, in respect of the *insufficiency* of the evidence. The evidence was the prisoners' declarations, which in no case warrant a conviction. They did not contain a plea of guilty; and it appears to us that this insufficiency of proof was inseparable from its defective nature. It will not do to say in answer, that the sentence was quashed on account of the declarations being unsigned, and on that ground only. The other objection was stated to the judicial Court, but it was unnecessary to dispose of it. The real fact, therefore, was, that the conviction was illegal, because it had proceeded on evidence which was utterly worthless. And the result to which we are brought by this judgment is, that henceforth agents are to be responsible for the sufficiency of a proof. This is the law for them, if it is to stand. We have not overlooked a decision (*Morrison v. Ure*, June 2, 1826, 4 S. 662), in which an agent was found liable to his client in consequence of an action he was conducting being thrown out of Court,—the proof having been taken on unstamped paper. There he was intimately associated with the blunder. He was present at the Commission, he examined the witnesses, the proof passed through his own hands, and he ought to have supplied the stamped paper.

There are much stronger cases on record against agents when they were found not to be liable: we shall refer to one recently before the same division of the Court. The defender conducted an action for the pursuer against Brander for a loan; and on a reference to oath, Brander swore negative of the resting owing, but admitted that he had received the proceeds of a bill to which the pursuer and the deponent were both parties. On this, Brander was absolved, and the pursuer instructed the defender to raise an action of count and reckoning against him in regard to the proceeds of the bill. In this action a proof was allowed, and subsequently another interlocutor pronounced, fixing a diet, and granting diligence against witnesses and havers. No proof having been adduced,

the term was circumduced, and Brander was assoilzied. Against this the agent reclaimed, on the ground that the *onus probandi* ought to have been laid upon Brander; but the judgment was adhered to, and he did not appeal, nor intimate any of these various steps to his client, although, as she alleged, he knew of available evidence which he might have adduced. The action of damages against the agent which followed was based on negligence; the pursuer averred that she had lost Brander's debt in consequence of not having had an opportunity of leading evidence; but a majority of the Court held that *crassa negligentia* had not been established (*Ross v. Urquhart or Grigor*, June 12, 1857, 19 D. 853). Is this not a much clearer instance of personal negligence on the part of the agent than that against Grant and Leslie? There was a virtual abandonment of the action which he was employed to conduct, without intimation to his client. It would be easier to draw a contrast between the cases than to show an analogy. A much nearer one in point of similarity was, where a trustee in a sequestration having neglected a duty which properly fell within his province, the creditors, who had appointed the agent, sought to make him responsible for the consequences. There the presiding Judge said the question was, whether, where creditors appoint an unfit person as trustee, they are entitled to look to the agent as responsible for the proper management of the estate? The Court assoilzied the agent (*Gourlay v. Stratton*, June 15, 1827, 5 S. 804).

We have purposely abstained from entering into the question whether or not Messrs Grant and Leslie may have any right of relief against the justices or their clerk. The sole point of inquiry has been, whether it is sound law to hold law agents *directly* liable for the omission or error of parties acting under the authority of a statute, and over whom they have no control. The observations we have made entitle us to say, that the principles of law and equity which have hitherto been applied to the relationship of agent and client, do not warrant an affirmation of that question. For the safety of that branch of the profession to which the defenders in this case belong, they ought to seek redress in the Court of last resort, and we have little doubt but they will obtain the approbation and countenance of their brethren in doing so. A decision so prejudicial to them ought not to be allowed to remain on the books.

THE LAW OF MASTER AND SERVANT—RECENT AMERICAN CASES.

IN the case recently before the House of Lords, in which it was found that there is no obligation on a master to repair the damage sustained by one servant through the misconduct of a fellow-servant, engaged in the same common employment, considerable weight was attached to the view taken of this point by the American courts.

Two American cases may tend to explain the principle on which this branch of our law now rests, more clearly than any formal examination of the subject. In this belief, and in order that they may be made readily available for professional use in this country, they are here reprinted.

MARWELL v. BOSTON AND WORCESTER RAILROAD CORPORATION.

Reported 4 Metc. R. 49, and cited in Story on Agency, 606.

In this case the facts were these :—Two persons were employed by the railway company—the one an engineer, to manage the engine and cars on the line, the other to tend the management and shifting of train switches on the railway. The latter, although he was properly selected by the company as a person of due skill and reasonable diligence, negligently put or left a switch across the railway, whereby the engine and cars were thrown off the track, and the engineer was severely injured.

He brought an action, therefore, against the company ; and it was held, upon full argument, that the action was not maintainable, but that the action should have been against the wrongdoer himself.

SHAW, C.J., in delivering the opinion of the Court, said—This is an action of new impression in our courts, and involves a principle of great importance. It presents a case where two persons are in the service and employment of one company, whose business it is to maintain a railroad and to employ their trains to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose—that of the safe and rapid transmission of the trains ; and they are paid for their respective services according to the nature of their respective duties, and the labour and skill required for their proper performance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer.

It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained. It is aid down by Blackstone, that, if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect ; but the damage must be done while he is actually employed

in the master's service, otherwise the servant shall answer for his own misbehaviour (1 Bl. Com. 431, *M'Manus v. Cricket*, 1 East. 106). This rule is obviously founded on the great principle of social duty—that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another, and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity, and the action in such case is an action sounding *in tort*. The form is trespass on the case for the consequential damage. The maxim *respondeat superior* is adopted in that case from general considerations of policy and security. But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear, may be regulated by express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated. The same view seems to have been taken by the learned counsel for the plaintiff in the argument, and it was conceded that the claim could not be placed on the principle indicated by the maxim *respondeat superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent, or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties applicable to this point, it is placed on the footing of an implied contract of indemnity arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master to be responsible to each person employed by him in the conduct of every branch of business where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service. If such a duty were established by law—like that of a common carrier to stand to all losses of goods not caused by the act of God or a public enemy, or that of an innkeeper to be responsible in like manner for the baggage of his guest—it would be a rule of frequent and familiar occurrence, and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go are opposed to the principle.—(*Priestly v. Fowler*, 3 M. and W. 1, *Murray v. So. Carolina Rail. Co.*, 1 M'Mullan, 385.) The general rule resulting from considerations as well of justice as of policy, is that he who engages in the employment of another for the performance of specified duties and services for

compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such service; and, in legal pre-emption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent and for some purposes; but whether he is responsible in a particular case for their negligence, is not decided by the single fact that they are for some purposes his agents.

It seems to be now well settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground that the loss was caused by the negligence or unskilfulness of the officers or crew of the vessel in the performance of their various duties as navigators, although employed and paid by the owners, and, in the navigation of the vessel, their agents.—(*Copeland v. New England Marine Insurance*, 2 Metc. Reports 440-443, and cases there cited.) We are aware that the maritime law has its own rules and analogies, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems to be a good authority for the point that persons are not to be responsible in all cases for the negligence of those employed by them. If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is in truth the basis on which implied promises are raised, being duties legally enforced from consideration of what is best adapted to promote the benefit of all persons concerned under given circumstances. To take the well known and familiar cases cited, a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the crown to adduce evidence of embezzlement or other actual fault or neglect on the part of the carrier, and although it may have been the real cause of the loss. The risk is, therefore, thrown on the carrier, and he receives in the form of payment for the carriage a premium for the risk which he thus assumes. So of an innkeeper.

He can but secure the attendance of honest and faithful servants, and guard his house against thieves ; whereas, if he were responsible only on proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even principals, in the embezzlement of the property of the guests during the hours of their necessary sleep ; and yet it would be difficult and often impossible to prove these facts. The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance, and skill on the part of themselves and all persons employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk on those who can best guard against it.—(Story on Bailments, sect. 590 *et seq.*) We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer.

Judgment for defendant.

RUSSELL T. NOYES v. JOHN SMITH AND WILLIAM R. LEE.

Reported 5 Am. Law Reg. 615.

In the Supreme Court of Vermont.

The declaration averred that the plaintiff was hired by the defendants, to have the charge of, and conduct and run an engine, and that by virtue of said employment, it became the duty of the defendants to furnish an engine that was well constructed and safe, etc. "Yet the defendants, disregarding this duty, to wit, on the 11th day of November 1853, carelessly and wrongfully gave to the plaintiff, to use and conduct in drawing freight on said road, an engine which had not before been conducted by or known to the plaintiff, which was insufficiently stayed and bolted around the fire box, and insufficient in divers parts ; insomuch that it greatly endangered the life of the engineer who ran it,—all which was unknown to the plaintiff, and all which, but for want of all proper care and diligence, would have been known to the defendants. And the plaintiff avers, that while in the careful and prudent use and management of said engine, on his part, on the 11th day of November

153, on said road, said engine exploded from the imperfection and sufficiency aforesaid, and by the explosion the plaintiff was so torn and scalded, that he hitherto, since that day, hath been and always will be a cripple, and wholly unable to work, and hath been put to great expense for doctors and nurses, to wit, 1000 dols., whereby, and by reason of all which, an action hath accrued to the plaintiff to have and recover his said damages, and all he hath lost from the uses aforesaid, to his damage," etc.

To this declaration the defendants demurred, and the County Court, September Term, 1855,—POLAND, J., presiding,—adjudged the declaration insufficient. Exceptions by the plaintiff.

The opinion of the Court was delivered, at the Circuit session in September 1856, by

ASHAM, J.—This case comes before the Court on a general demurrer to the declaration. The plaintiff, it is averred, was injured by the explosion of a locomotive engine, on which he was employed as engineer. It is admitted that the engine was insufficiently stayed or bolted around the fire box, and that it was so insufficient and unsafe in other respects, but that both parties were ignorant of those defects, and had no notice in fact that it was in an unsafe or insecure condition. That fact is directly averred in relation to the plaintiff, and the defendants are not charged with any notice by any averment in the declaration. It is averred, however, that these defects would have been known to the defendants, if for the want of all proper care and diligence on their part. The inquiry arises, whether the facts stated are sufficient to enable the plaintiff to recover; it being admitted that the plaintiff was in the exercise of proper skill and diligence when he was injured.

The general rule seems to be well settled by the authorities, that there is nothing growing out of the mere relation of master and servant that raises the duty stated in the declaration. When there is no actual notice of defects in an engine of that character, and no personal blame exists on the part of the master, there is no implied obligation or contract on his part that the engine is free from defects, that it can safely be used by the servant. The law imposes no such obligation. There are risks and dangers incident to most employments, and, especially is this true, in relation to such services as those in which the plaintiff was engaged. Those risks the parties have in view when engagements for services are made, and in consideration of which the rate of compensation is fixed. In all engagements of that character, the servant assumes those risks which are incident to his service, and, as between himself and his master, he is supposed to have contracted on those terms. If an injury is sustained by the servant in that service, it is regarded as an accident, a mere casualty, and the misfortune must rest on him. That is the doctrine, and the extent of the cases, to which we were referred by the defendant's counsel. In the case of *Priestly v. Fowler*, 1 Mees. and Welsb. 1, it was held that the master was not liable to

his servant for an injury sustained by him, from the breaking down of an overloaded van. Lord Abinger in that case observed, that "from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant, arising from any vice or imperfection unknown to the master, in the carriage or in the mode of conducting or loading it." The same doctrine is sustained in *Seymour v. Madox*, 5 Eng. L. and Eq. 265, and in the case of *Couch v. Steel*, 24 Eng. L. and Eq. 77. The principle, which is now well settled in England and this country, "that a master is not liable to his servant for an injury occasioned by the negligence of a fellow-servant, in the course of their common employment," is founded upon the same reason. The liability of one servant to be injured by the carelessness of another, is a risk which the servant has assumed, as an accident to his employment, and for which the master is not responsible. This general rule, however, has no application to either of those cases when there has been *actual fault or negligence* on the part of the master, either *in the act from which the injury arose, or in the selection and employment of the agent which caused the injury*. The case of *Couch v. Steel*, above cited, recognises both the general rule and that qualification. In that case it was held, that, as there was no *actual knowledge* of the defective condition of the ship, and *no personal blame* was imputed to the owner, a seaman could sustain no action for an injury sustained in consequence of its unsafe condition. The language of the Court implies, that, had there been *actual knowledge, or if personal blame* had otherwise been imputed to the ship-owner, a liability would have existed. The case of *Hutchinson v. Railway Company*, 1 Wels., Hurls. and Gord. 352, is a strong illustration of the principle. In that case, Alderson, B., after recognising the general rule, that a master is not, in general, responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant observed, that "this must be taken with the qualification *that the master shall have taken due care not to expose his servant to unreasonable risks*." The servant," he observed, "when he engages to run the risks of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks, by associating him only with persons of ordinary skill and care." There can be no doubt in relation to the doctrine of those cases, or the general principles on which they are founded. The master, in relation to fellow-servants, is bound to exercise diligence and care that he brings into his service only such as are capable, safe, and trustworthy, and for any neglect in exercising that diligence he is liable to his servant for injuries sustained from that neglect. It is not necessary that he should know that they are unsafe and incapable. It is sufficient that he would have known it, if he had exercised

reasonable care and diligence. The same doctrine is sustained in this country. 1 Am. L. C. 620; 5 Wels., Hurls. and Gord. 357; note; Coon v. U. and S. Railroad Co., 6 Barber, 231. There is no distinction in principle between those cases and the one under consideration. Upon the facts admitted by this demurrer, whatever may be the agent which the master brings into his service, whether animate or inanimate, the master is bound to exercise care and prudence that those in his employment be not exposed to unreasonable risks and dangers;—and the servant has a right to understand that the master will exercise that diligence in protecting him from injury, and also in selecting the agent from which it may arise. It is only such injuries as have arisen after the exercise of that diligence and care on the part of the master, that can properly be termed accidents or casualties, which the servant has impliedly agreed to risk, and for which the master is not liable. The doctrine is not controverted, that the defendants would be liable to the plaintiff for the injury he has sustained, if they had had notice in fact of the defective condition of the engine. It was so expressly decided in the case of Keegan v. Western Railroad Corporation, 4 Selden, 175. There is no propriety, therefore, in saying that the defendants may be relieved from that liability by a want of such knowledge, when it has arisen from their gross neglect; for the neglect is gross, when the fact is, as is admitted by the demurrer, that *but for the want of all proper care and diligence, the unsafe condition of the engine would have been known to them*. We think, upon the facts admitted by the demurrer, the plaintiff can sustain this action, and that the declaration is sufficient.

The judgment of the County Court must be reversed, and judgment rendered for the plaintiff.

Review.

The Late Appointments.—Lord Glencorse has taken his seat as Lord Justice-Clerk; and in his room Mr Moncreiff, by the unanimous voice of his brethren, has been elected Dean. So terminates a connection between Mr Inglis and the Bar, which every member of the profession cannot but contemplate with the liveliest pride. Being known only to the public as a brilliant and successful pleader, it may be here proper to refer to the highly satisfactory way in which he filled the office of Dean of Faculty. This cannot be properly appreciated save by those who had the advantage of his professional intercourse. While few of his illustrious predecessors reflected, by their appearances in public, more honour on the high office which, for the comparatively long period of six years, it was

his fortune to fill; no one was ever more thoroughly earnest in his endeavours to make it practically available for the purposes which it is intended to serve. His uniformly courteous bearing towards even the youngest of his brethren—his readiness to give advice—to preserve that unity of sentiment and promote that social harmony for which the Bar has always been eminent—will long be gratefully remembered. Not less constant were his efforts to maintain the privileges and independence of the Bar, and to secure a scrupulous observance of the rules of professional etiquette. He was chiefly instrumental in carrying through the regulations of 1854, respecting the admission of intrants. These substituted a real for a nominal test of qualification in both scholarship and law; and in after years will doubtless have the best effect in preserving the reputation of the Bar as a learned society and a national institution. And it is not to be forgotten that—to use the language he himself employs in his letter of farewell—his efforts to maintain the interests of the Faculty were not “the exhibition of mere official zeal, but the result of an abiding sentiment, and a strong conviction that to the efficient and satisfactory administration of justice, not even the purity of the Bench is more requisite than the integrity and independence of the Bar.”

Consequent on Mr Inglis' elevation, the duties of Lord Advocate devolve on Mr Baillie, a gentleman better known in the profession (in which he is much esteemed) than out of it. It is doubtful whether he will ever be required in Parliament. Mr David Murray has become Solicitor-General—another highly popular appointment; and in his room Mr E. S. Gordon, the senior Advocate-Depute, is appointed Sheriff of Perth.

The Accountant in Bankruptcy's Report.—The Accountant in Bankruptcy, appointed under the recent Bankruptcy (Scotland) Act, has reported to the Court the results of the operation of that Act during the first year of its existence, being the year ending 31st October 1857. The report itself is very elaborate and somewhat voluminous, as it contains full statistics, so far as possible, of all the sequestrations awarded under the Act. There are three very important results established pretty decisively by these statistics:—(1.) The general preference of the Sheriff Courts to the Court of Session as the forum for sequestration; (2.) the readiness of creditors to settle with bankrupts by composition; and (3.) that the expense of sequestration in Scotland, during the year, has been about 12 per cent.

I. There were 432 sequestrations awarded in all,—107 by the Court of Session, and 325 by sheriffs; so that, as near as may be, three-fourths of the sequestrations were awarded in the Sheriff Court, designed in English phrase “the Local Court,” as distinct from the Court of Session or “Central Court.” 188 of these 325 were awarded in the Sheriff Court of Lanarkshire. This decided preference

of the Sheriff Court to the Court of Session vindicates the policy of extending jurisdiction in sequestrations to the Sheriff Court ; it being found to be much less expensive, besides relieving the Junior Lord Ordinary of a great deal of work which can be as well performed elsewhere.

II. It appears that during the past year there have been 97 sequestrations closed by composition. Of course that number is of little or no value in estimating the probability of the number that will be closed in the same way next year, as the number of sequestrations are too few to found on them any theory of probability as to what may happen in a course of arrangements which depend so much upon the various accidents of trade, and convenience, and caprice. But one result is noticeable, and that is, that the average cost of winding up in these 97 sequestrations was L.88, 2s., which, for a considerable estate, is no doubt a smaller sum than the more regular method of distribution by a trustee would cost.

III. The cost by that method is about 12 per cent. on the gross receipts, and the items of it are made up as follows :—Allowance to bankrupts, $\frac{1}{2}$ per cent. ; trustee's commission, $4\frac{1}{2}$; law expenses, $3\frac{1}{2}$; ordinary miscellaneous charges, $3\frac{1}{2}$. From these we take leave to strike the bankrupt's allowance to modify the law expenses to 2 per cent., and the miscellaneous charges to about the same rate, and arrive at the possible and extremely probable expense as about 9 per cent. The trustee's commission of about 5 per cent., and the expense of obtaining sequestration, Gazette publications, circular letters, and expenses of that class, are all that are absolutely indispensable ; and we have little doubt that the rate of 8 per cent., which was stated at the late Birmingham Conference as the cost of Scottish sequestrations, though a little under, is not really far from the mark. No doubt, it is always perfectly easy for an ingenious trustee, assisted by ingenious legal advice, to expend half the bankrupt estate upon litigation. But this unreasonable expense is not absolutely necessary in Scotland as in England, where the expense of dividing bankrupt estates varies from a half to a fourth of their value, and cannot by any ingenuity, legal or mercantile, be diminished in the existing state of the law.

We need not descant upon the excellence of our present bankruptcy laws ; but we beg leave, in all friendliness and humility, to recommend them strongly (if it be necessary so to do) to the attention of all English law reformers, as well as this most elaborate and thorough report on their operation. Verily, their benefits might be stretched to another sort of persons than their late famous patron, Mr John Edward Stephens of Gothic Lodge, Twickenham.

The Legitimacy Declaration Bill.—The independence of the laws and courts of this country was never more seriously imperilled than by a bill which has just passed through the House of Commons under the above title. The object of the measure is to give the

New Court for Divorce and Matrimonial Causes the same jurisdiction, in questions of status, as the Scotch courts have enjoyed for centuries. To this no exception could be taken. The introduction into England of a form of action which has been a familiar part of our practice since the Reformation, would be an improvement which no class would more gladly see effected than the lawyers of the country whence it has been borrowed. But with a cool audacity, the framer of the bill went a great deal further. The terms of the first section, as it originally stood, will show the length to which some English lawyers, in dealing with this country, are prepared to go. In the most sweeping terms, it provided:—

“Any natural-born subject of the Queen, or any person whose right to be deemed a natural-born subject, depends wholly or in part on his legitimacy or on the validity of a marriage, may apply by petition to the Court for Divorce and Matrimonial Causes, praying the Court for a decree, declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject may in like manner apply to such Court for a decree declaring that his marriage was or is a valid marriage, and such Court shall have jurisdiction to hear and determine such application, and to make such decree declaratory of the legitimacy of the petitioner, or of the validity or invalidity of such marriage as to the Court may seem just.”

By this clause, “any natural-born subject of the Queen,” that is to say, any person in any part of the British dominions, would have been subject to this English Court. A Scotch pursuer would be permitted, and a Scotch defender would be compelled, to appear in a court in London for the vindication of rights already provided for by the existing tribunals of the country. This clause has, however, been considerably modified in committee. It now runs,—“Any natural-born subject of the Queen, etc., *being domiciled in England, or claiming any real or personal estate situate in England or Ireland.*” This will confine the operation of the measure to more legitimate limits, but the generality of the terms will raise some serious questions of jurisdiction; and if the Act is not meant to extend to Scotland, as the framers affirm, it would have been very desirable to have said so in express words. A clause has been introduced into the bill in committee to the following effect:—

“8. Any person domiciled in Scotland, or claiming any heritable or moveable property situate in Scotland, may raise and insist in an action of declarator before the Court of Session, for the purpose of having it found and declared that he is entitled to be deemed a natural-born subject of Her Majesty, and the said Court shall have jurisdiction to hear and determine such action of declarator, in the same manner and to the same effect as they have jurisdiction in declarators of legitimacy and bastardy.”

This clause was carried in committee by a majority of 148 to 14, the Attorney-General stating that it was in the shape in which he had received it from the Lord Advocate. It is a merely nominal extension of the existing powers of the Scotch courts, and seems,

herefore, to be superfluous. It may, however, assist in the interpretation of questions which will occur as to the sphere and operation of the measure.

A greater shock to one's sense of legal propriety can scarcely be imagined, than a proposal by the framer of the bill to make its operation retrospective. The section was in the following terms:—

“No application under this Act shall be refused upon the ground that the matter or right sought to be thereby established may have been adjudicated upon or decided, either expressly or by implication, previously to the passing of this Act, but no sentence or decree of the Court shall alter or affect any rights or interests in any real or personal estate which have already been adjudicated upon by any Court of competent jurisdiction.”

The Act would thus have enabled any person to open up all the great questions which have been decided by the Court of Session in the law of marriage for the last century. After the rights of parties had been fully litigated and conclusively settled, the unsuccessful party or his descendants might begin *de novo*—with the additional privilege of having the matter decided by a foreign tribunal. The specious pretext on which it was put forward was, that by the civil law no decision relating to status ever could be final. *Inter alia*, we would have had *Shedden v. Patrick* all over again. Happily the preposterous absurdity of the proposition was too apparent, and, accordingly, it was withdrawn in committee by those in charge of the bill.

The New Statutes.—The Titles to Land Bill is now law. It is to be extended next year to property held by burgage tenure. It appears to have had an easy progress in both Houses of Parliament—the fate of the measure having been very properly left to the determination of the law bodies in Scotland. The Confirmation of Executors Bill will emerge from the House of Lords in much the same form as it was introduced in the House of Commons. The principal change will be the adoption of a suggestion made by the Committee of the Faculty of Advocates, to remove the option given to executors, to be confirmed either by the commissary of the county of the deceased's domicile or the commissary of Edinburgh. The creation of the Commissariat of Edinburgh into a commune forum was, in the first place, unwise—because confirmation should always proceed in that part of the country where the deceased was personally known. Further, were two courts made competent, there might arise a conflict of jurisdiction. Secondly, it was an unnecessary and uncalled-for innovation on the existing state of matters. In former times, no doubt, the Commissariat of Edinburgh did exercise an extensive jurisdiction, both primary and by review. It included Edinburgh, Haddington, Linlithgow, Peebles, and (in part) Stirling. When the two counties last named emerged into independence does not exactly appear; but it was not until the year 1830 that, by an

Act of the Legislature (11 Geo. IV. and 1 Gul. IV. c. 69, sec. 30), the others, like the other counties of Scotland, were declared each by itself to constitute a Commissariat. By sec. 31 of the same statute it was enacted, "that the Commissary Court of Edinburgh shall possess and exercise the same, and no other, jurisdiction in the sheriffdom of Edinburgh, than that possessed and exercised by sheriffs, being commissaries, in other sheriffdoms of Scotland; and that any jurisdiction of a more extensive nature, heretofore possessed or exercised by the Commissary Court of Edinburgh, shall entirely cease, save and except such as may regard the granting of confirmation of testaments of persons dying furth of Scotland, having personal property in Scotland, which jurisdiction is hereby reserved to the Court." We are not aware that any inconvenience has arisen from this enactment. It seems a fair settlement of the matter of jurisdiction, and of the privileges of town and country practitioners; and in the absence of any reason for the change, we cannot but concur in the propriety of the amendment which has been adopted.

The Registrar of Sasines.—This vexed question is at an end, the House of Commons having agreed to give Mr Brodie his salary. In Committee of Supply the resolution was adopted:—

"That, in addition to the sum of L.14,118, already granted to her Majesty, to defray the salaries and expenses of the several offices in her Majesty's General Register House, Edinburgh, to the 31st day of March 1859, the sum of L.1000 be granted to defray the salary of the Keeper of the General and Particular Registers of Sasines, making together the sum of L.15,118."

It is in vain to dispute that, when a vacancy occurred in 1857, the two offices of principal registrar and assistant should have been consolidated. The principle of paying two persons to do one man's work can no longer be maintained, and Parliament does not seem disposed to lend it any countenance. If the sinecure office had been abolished, and the salary of the deputy raised to L.1000, a saving of L.500 a-year would have been effected. Now, however, that Mr Brodie is confirmed in his appointment, we hope to see a gentleman of his experience and admitted business talent doing something for the money. If he does his duty in regard to the important changes that are under consideration with respect to our whole system of registration, the office will certainly be no longer a sinecure.

New Acts of Sederunt.—We print with this number two new Acts of Sederunt, which have just been issued, and which came into operation on the 20th of last month. The one provides for certain additions to and alterations of the existing Act, regulating the fees payable to agents conducting cases before the Court of Session. The most important amendment is the abolition of the former practice of allowing a small fee to the agent at every calling of a case in

e. Debate Roll, whether the debate proceeded or not. In room this, a universal charge of two guineas is now allowed to the agent at the conclusion of every debate, in both the Inner and Outer House, which is to include all his trouble in watching the callings of the case and attending the debate. In addition to this, a fee of 3s. 4d. is allowed for preparing for a hearing, or an advising in the Inner House, or a debate in the Outer House, where no memorial has been prepared. In the Inner House, the agent is also allowed a fee of 6s. 8d. for examining the opposite party's reclaiming note and appendix, in order to ascertain their accuracy; and like fee for each day on which a case stands in the rolls, though is not called. Even in the Outer House, the Lord Ordinary is empowered to authorise the charge of a larger fee for debate, where has been unusually prolonged. These new fees are liberal, but not extravagant, and will prove, we doubt not, acceptable to the profession. The other Act has reference to a new mode of retaining ventories of processes, and regulating the hours of attendance of the Register House clerks. No provision is made, however, for what is undoubtedly a grievance, of which we have heard several complaints. We refer to the very short hours of attendance in the Bill Chamber. Why is it that letters of inhibition against a debtor, species of diligence which is often worthless unless executed readily, cannot be obtained betwixt 12 o'clock on a Saturday and o'clock on Monday afternoon?

For the first time, advantage has been taken of a remarkable provision in the Court of Exchequer Act. By sec. 44, the right of the Court to pass Acts of Sederunt is transferred to the Lord President, Lord Advocate, and Lord Ordinary in Exchequer causes—a provision which is perhaps less necessary now than formerly. In virtue of this section, certain regulations have now been issued, to which the attention of practitioners is called.

The Circuits.—The following are the arrangements for this autumn:—

NORTH.—Lords Justice-Clerk and Ivory.—*Inverness*, Thursday, 30th September. *Aberdeen*, Monday, 4th October, at 12 noon. *Perth*, Thursday, 7th October. John Millar, Esq., *Advocate-Depute*. James Aitken, *Clerk*.
 WEST.—Lords Cowan and Deas. *Inveraray*, Thursday, 16th September. *Stirling*, Wednesday, 22d September. *Glasgow*, Tuesday, 28th September. Robert B. Blackburn, Esq., *Advocate-Depute*. David Wyllie, *Clerk*.
 SOUTH.—Lords Ardmillan and Neaves. *Jedburgh*, Thursday, 9th September. *Dumfries*, Tuesday, 14th September. *Ayr*, Tuesday, 21st September. Archibald Broun, Esq., *Advocate-Depute*. Alexander Stuart, *Clerk*.

Correspondence.

REVENUE PROSECUTIONS.

By a recent very salutary statute, the Crown is compelled to come into the Court of Session like any other litigant, and to pay costs on failure—so far so good. But then, the general public is absolutely helpless in the hands of the Crown officers who administer a law which is known only to themselves. No doubt, by the Court of Exchequer Act, there is a certain defined course of procedure; but what can be said of proceedings before the Justices of Peace, who are required to administer a law on “information,” “conviction,” and “commitment,” entirely English, and in reference to which Scotch lawyers are at sea? Where is this law to be found? Surely the time has come for reducing this important branch of law to something like order. As at present administered, it might be written in an unknown tongue, and the unhappy accused is left entirely at the mercy of the Crown officer for the time.—Yours, etc.

ONE AGGRIEVED.

AUTHOR AND SUBSCRIBER.

Will you give me an opinion on the following question? Being a person interested in the sins of my fellow-creatures, the section in the Digest most interesting to me is that of “Crime.” Of course, I buy the *Justiciary Reports* and duly consult the Indices thereof, the quality of which you may yourself decide upon when I call your attention to vol. i., p. 662, of Mr Brown’s Reports, where, under the title “*HOLY SCRIPTURES*,” he gives me this reference, “See *BLASPHEMOUS PUBLICATIONS*.” As I (being bred in the country) do not regard the sacred volume in this light, of course, I lost all confidence in these indices, and forthwith bought Mr Macbrair’s Digest.

Well,—having paid my money, I consulted the section “Crime,” and was instructed thus:—

“*CRIME*. See cases in crime from 1840 to 1855 at the end of the volume.” Nothing doubting, I proceed to the end of the volume, and to my astonishment I get the following note.

“*Note*. The article ‘*CRIME*,’ containing the cases from 1840, will be published separately as a supplement.”

The Digest was published in 1856, and I have now waited patiently for two years for the promised supplement,—in vain. I now therefore apply to you for an answer to the following queries:—1. Have I a good action against Mr Macbrair and his publisher conjunctly and severally, or severally, and if so, against which of them, for return of the money which I paid for a book which has turned out to be utterly useless to me? 2. Or, in the event of your being of opinion that I have no such action for return of the whole price, have I a good action for the return of the value of the omitted section on “crime?” 3. In the event of such an action lying, as is referred to in the second query, at what price would the value be estimated;—in other words, for what sum should I conclude for repetition?—I am, etc.,

A PROSECUTOR.

[We have always declined to offer opinions upon questions of law; but we would rather advise our correspondent to try the questions raised by him, were it for no other purpose than to establish the value of legal publications, even though in manuscript. If our correspondent concluded for repetition of a very large sum as the value of the omitted section, in all probability the action would be undefended.—Ed. J. J.]

CLERKS' FEES.

As all branches of the profession are about to suffer in their professional emoluments by the Completion of Titles Act, I think that it is a proper opportunity for bringing forward the position of advocates' clerks. These gentlemen having been unaffected by all legislative changes, are now drawing fees out of all proportion to the value of their work and the amounts paid to their masters. The only result of a continuance of the present system will be a steady diminution of the income of gentlemen of the bar, in consequence of the objection which agents have to pay 7s. 6d. to clerks, whom they never see till the session is finished, for every guinea sent to counsel. The arrangement is so utterly preposterous, that I cannot conceive how the practice has been permitted to continue; and, through your valuable *Journal*, I would draw the attention of the profession generally, and the advocates in particular, to the necessity for a reform. My notion is, that the English system ought to be adopted—viz., for counsel to accept of half-guinea fees for motions, and their clerks to get 2s. 6d. for all fees below, say, three guineas.—I am, etc.,

AN AGENT.

TRUSTEE.—*Purchase by.*—The Court of Appeal has reversed the decision of V. C. Kindersley in *Pooley v. Quilter* (noticed *sup.* 314), 5 W. R. 402. A creditor sold the dividends due on his debt to a person who was formerly his solicitor, for his own behalf, and on behalf of two other persons, one of whom was a creditor's assignee in the bankruptcy, and in partnership with the accountant on the bankruptcy. On a suit by the creditor the sale was set aside; and the system of assignees purchasing the debts of creditors strongly disapproved of.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

Susp.—WILLIAM MACLEAN AND OTHERS. *Resp.*—ANDREW MOODY.—
June 23.

Exclusive Privilege—Copyright—Shipping Intelligence—Title to Sue.

William Maclean and Others, describing themselves as Directors of, and subscribers to the Customs Annuity and Benevolent Fund, established under Act of Parliament, and publishers of the "Clyde Bill of Entry and Shipping List," applied for interdict to prevent Andrew Moody publishing in the "Glasgow Mercantile Advertiser," of which he is proprietor, information published by the complainers, and which they claimed the exclusive right to publish. They set forth, that in 1817 the Directors of the Customs Fund established "The Clyde Bill of Entry," and in 1841, they obtained permission from the Treasury "to have access to the official books, papers, and records at Glasgow, in which the information is kept,"—"for the publication of a commercial and shipping list," "and to extract or copy such information as may be required." The "Bill of Entry," they further alleged, contained the fullest and most authentic information relating to the different vessels and their cargoes at the several ports of Glasgow, Greenock, Port-Glasgow, and Grangemouth; the quantities and kinds of goods imported; the quantities and kinds taken from the ship duty free and duty paid; the quantities and kinds taken from the warehouse duty paid; the quantities and kinds warehoused, and the quantities and kinds exported; besides a variety of shipping intelligence. All this information, they

said, was collected from the official records and documents in the custom-houses at these ports, and from no other sources whatever, and compiled and arranged by them for publication, and published at an expense so great as to exhaust the proceeds of the sale. The work of compiling and digesting the information, they further said, was one of great labour and time; and they, the suspenders, "only got the materials from the custom books, out of which they make their digests, classification, and calculations." They therefore pleaded that their sole control over the customs books for the purpose of obtaining the information in question, gave them the exclusive privilege of publishing it; and the "Clyde Bill of Entry" being entered at Stationers' Hall, pursuant to the Act 5 and 6 Vict., cap. 45, they were entitled to interdict as gravely. *Replied*—The Act 5 and 6 Vict. is for the protection of copyright. It does not apply to the "Clyde Bill of Entry," which publication is not the composition of the complainers, and therefore does not fall within the operation of the statute. Further, the title of the complainers is defective. They are registered not as Directors of the Customs Fund, but as individuals; nor is it alleged that they paid for the articles in the publication, in regard to the authorship of which they claim a copyright. It was denied that they were Directors, or entitled to hold the copyright in question, or sue on behalf of the Customs Fund. *Held*—That the question was one of copyright under the statutes, and treating it as such, the entry in the register was *prima facie* evidence that the complainers were proprietors, and entitled them to insist in this suspension; therefore to that extent the respondent's objections repelled, and issues appointed to be given in by the complainers; and the respondent also allowed to give in issues if so advised.

ANDREW RUTHERGLEN v. WILLIAM HERBERT.—June 23.

Obligation—Borrowing of Writs.

Andrew Rutherglen, accountant in Glasgow, borrowed in October 1857 from William Herbert, writer in Rothesay, a receipt and discharge by Peter McEwan in favour of Mr John Bell, "to be returned on demand." When applied to for the discharge, Rutherglen refused to return it, on the ground that Bell, in whose favour the document was granted, and to whom it belonged, had expressly instructed him to retain it. Herbert applied to the sheriff to compel delivery. Rutherglen produced a correspondence which verified his statement. The sheriff held, that the defender having borrowed the discharge on an obligation to return it, was not entitled to retain it on any pretence whatever. The defender advocated and pleaded, that the respondent had no right, as against its owner, over the document in question. Even if now ordered to be returned, the owner would immediately demand it from the respondent, who had therefore no interest to insist on having it restored to him. This case clearly came within the rule *frustra petis quod mox restitutus es*. *Held*—That the obligation to return on demand was clear, and it would be dangerous to allow any subsequent proceedings to defeat the obligation. When practitioners borrowed papers from each other in this way, their first duty was to restore them.

THE ACCOUNTANT OF COURT v. GEORGE BAIRD (Tutor-at-law to Misses Baird).—June 29.

Tutor-at-law—Liability for depreciation of unrealised Bank Stock.

Mr Douglas Baird, one of the partners of William Baird and Co., died intestate on the 7th of December 1854, leaving a widow and two daughters, both in pupillarity. Their uncle, Mr George Baird, was served tutor-at-law to the pupils in January 1855. Mr Douglas Baird was at his death possessed of the estate of Closeburn and other heritable estates, and also of large personal effects, invested chiefly in numerous trading and other companies, of which he held shares, or was a partner. The tutor entered at once on the duties of his office. The interests of the pupils in these trading concerns were brought to a close, and were ascertained to be worth upwards of L.150,000. In 1855, Mr Baird

ordered, in terms of the Pupils Protection Act, an inventory of the estates of the pupils, both heritable and moveable, including in the latter L.25,564, as the price of 332 shares of the Western Bank, at L.77 per share, and amounting in all to L.224,864, 1s. 5d. His first accounts were lodged on 30th April 1856, and these showed that about L.84,000 had been realised from the private companies, and invested on heritable security. On 16th June 1857, the accountant issued a draft report on the accounts, in which he drew the tutor's attention to the propriety of realising the share property. The tutor in answer stated, that having made great progress in realising the funds from the private companies, he would proceed with the necessary discretion to realise the funds invested in the public companies. The accountant, on 15th July 1857, issued his final report; and on 4th December 1857, he issued the following requisition:—"In respect the tutor has since 8th February 1855 continued to retain the 332 shares in the Western Bank of Scotland, which belonged to the father of the pupils, though warned by the accountant that it was his duty to realise them; and in respect, further, that the said Western Bank has been compelled to suspend business, and it is believed that great loss will occur to the shareholders: points Mr George Baird, the said tutor-at-law, to consign in bank, within one month, the sum of L.25,564, being the value of the said shares as stated in the inventory of the estate lodged by the tutor, reserving such further liability on the part of the tutor, for loss beyond the value of the said shares, as may arise to the pupils from being continued as partners in said bank."

The tutor lodged a note of objections to this requisition. He contended, that having found sufficient caution, the requisition was unwarranted. His actings had been all along judicious. He had disobeyed no order to realise. At most, he had only got a "warning" to realise, and he had acted upon it in regard to his wards' affairs as he would have done in regard to his; and no greater diligence could be exacted from an unpaid administrator. In June 1857, the bank stock had actually risen in value. He himself was interested in the bank; and had he any of his family, who were well known throughout the country to be largely engaged in mercantile transactions, thrown so large a number of shares on the market at once, a great fall in value would have immediately ensued. He was not liable for anything short of *culpa lata* (Pupils Protection Act, sec. 6, 19, 20; Thomson, 10th February 1838, 16 S. 560; Buxton, 1 Mylne and Craig, 80). Held—That the shares were depreciated in value by no act of the tutor. The chief ground of the demand for consignment was, that he had delayed to realise, a delay that might ultimately affect the question of liability, was not now before the Court. The question of ultimate liability must be raised otherwise, and determined on other grounds. But the tutory was still subsisting, and the tutor and his cautioners were amply responsible to meet any claim which might hereafter be made against them in regard to this matter. There was therefore no sufficient reason for ordering the tutor to consign out of his own funds the amount of the depreciation in value, be it the entire value or half the value.

LORD LOVAT AND OTHERS v. FRASER.—June 30.

Process—Reclaiming Note—Competency.

In this case, a reclaiming note, dated 10th December 1855, was disposed of on 10th December 1857 by an interlocutor remitting the case to the Lord Ordinary to take proof. The Lord Ordinary disposed of the case by an interlocutor, dated 8th June 1858, against which a reclaiming note was presented with this reference:—"For record, etc., reference is made to reclaiming note for Lord Lovat, etc., boxed 10th December 1855; to appendix A, boxed 27th November 1857; and to print of document B, herewith boxed." The Act of Sederunt of 24th December 1838 declares, that the regulation of the A. S. 11th July 1828, sec. 77, providing that where proceedings or documents in a cause have once been printed and boxed, it shall not be necessary to box the same again along with a reclaiming note, but only to refer to such former paper by its description and date, "shall be held to apply only to proceedings or documents which have been boxed within two years previous to the date at which

they shall be again referred to ; after which printed copies of the former proceedings shall be boxed, or furnished to the judges of the Inner House, before which the cause may again be brought." *Objected* therefore, that this reclaiming note was incompetent. More than two years having elapsed since the date of the previous reclaiming note, the record ought to have been boxed along with it (*Thomson v. Forbes*, 21st May 1847, 9 Sess. Cases, 106).—*Objection repelled*. Observed that the reference in this reclaiming note to the appendix boxed in November, and to the record, was sufficient to import into it all the documents necessary to make it competent. The recent date at which the case was before the Court was also a specialty in favour of the competency of the note.

LORD BLANTYRE V. ALEXANDER DUNN.—July 1.

Superior and Vassal—Untaxed Entry—Lease—Landlord and Tenant—Confusio.

Lord Blantyre is the superior of the lands of Easter Milton of Duntocher and teinds thereof. The *dominium utile* of these lands and teinds, excepting those called Cowbriggan, was feued out at an early period by a predecessor of Lord Blantyre, and came to be vested in Sir Charles Edmonstone of Duntreath, as the vassal. In the feu-right the entry of singular successors is untaxed. The proprietors of the lands in the feu-right let a portion of them, called the Wheat Croft of Easter Milton, for 300 years, from Martinmas 1770, at a yearly rent of L.6 sterling, and another part of the lands, called Upper Milton and Hardgate, for 361 years, from Martinmas 1776, at a yearly rent of L.14 sterling. In the years 1813 and 1820, the late William Dunn, merchant in Glasgow, acquired right to the tenants' interests in these long leases by separate assignments, taken in favour of himself, and his heirs and assignees whomsoever. At a judicial sale of Sir Charles Edmonstone's lands, the said William Dunn purchased the *dominium utile* of the lands of Easter Milton of Duntocher and teinds thereof, except Cowbriggan ; and by a decree of sale, dated 7th February 1828, the Court sold and adjudged the lands and teinds to belong to William Dunn, his heirs and assignees whomsoever. William Dunn possessed the *dominium utile* of the lands and teinds under the decree of sale until his death, on 13th March 1849 ; and having died without issue, he is now represented by the defender, his only surviving brother-german, who was served heir in general to him in December 1851. The defender having applied for an entry, Lord Blantyre, as superior, granted a charter of sale in his favour on the 11th March 1852, under which the defender was infeft in the *dominium utile* of the lands and teinds. The parties having differed as to the amount of composition, it was agreed, when the charter was granted, that the pursuer's claim for composition and the defender's objections thereto should remain as entire as if the defender were still unentered, and that the question should be determined as if the charter were to be delivered and the composition paid *unico contextu*. Lord Blantyre now brought this action to enforce payment of his claim. He pleaded, that the composition due to him by the defender as a singular successor was the present actual yearly rent or value of the lands—about L.250—subject to the usual legal deductions, and without regard to the long leases, which, he maintained, were extinguished in the person of the late Mr Dunn, who, by acquiring them, did not thereby become his own tenant, but had thereafter—as well as the defender—exercised every right affecting the lands in the same manner and to the same effect as if the leases had never existed. The defender pleaded, that he was only liable to pay the rents in the long leases so far as regards the subjects embraced by them, being about L.20. *Held*—That when the defender applied for and obtained an entry in 1852, the long leases were not subsisting burdens or limitations on his right and title as proprietor in fee-simple ; and that, as the entry of singular successors was not taxed, Lord Blantyre, as superior, was entitled to a year's rent of the subjects, as the same were let, or might be let, at the time of the entry, under the usual deductions, and that the composition must therefore be fixed, not according to the stipulated in the leases, but according to the actual value in 1852. The

Court had some hesitation in holding that the leases had been extinguished *confusione*; but even supposing confusion were held to operate as only a temporary suspension of them, while the two characters of landlord and tenant, or the debit and credit, were united in the same person, this would not avail the defender's argument. According to his own showing, he was both landlord and tenant when he obtained his entry from the superior in March 1852, so that, supposing there was only a temporary suspension of the operation of the leases when the two characters were united in the defender, it followed that the leases could not be founded on as fixing the rents in this question, which must be regulated by the state of matters at the date of the entry.

GEORGE BIRNIE and OTHERS (Thom's Trustees) v. CATTANACH.—*July 2.*

Succession—Clause—Construction—Vesting.

The late Margaret Thom, residing in Aberdeen, by last will and testament appointed certain parties to be her executors, and she instructed them, by the second purpose of her will, to invest on heritable security the residue of her moveable and personal estate, and out of the interest thereof to pay her niece Elizabeth Thom an annuity of L.25 sterling, and the remainder to Mrs Janet Middleton or Thom, relict of John Thom, the nephew of the testatrix, for her maintenance and the education of her children, John, Janet, and William Thom, until the youngest of them should attain the age of twenty-one years complete. After that event she directed her executors, by the third purpose of her settlement, to pay over to the children, share and share alike, one half of the whole residue—except the stock of the annuity to Elizabeth Thom—and to pay to Mrs Janet Middleton or Thom, their mother, the interest of the other half. After the death of Mrs Thom and of the niece Elizabeth Thom, the fourth purpose directed,—the youngest of the children having attained the age of twenty-one years complete,—that the executors should divide the free remainder of the personal estate of the testatrix among John, Janet, and William Thom, and the survivor of them and their heirs, equally among them. The fifth purpose provided for the contingency of all the children dying without lawful issue, and before receiving payment of their shares, in which event the personal estate was to be paid to Elizabeth Thom, whom failing, to the nearest of kin of the testatrix. The testatrix was predeceased by her grandnephew John Thom. William died in minority and unmarried. Janet also died in minority in 1853, but leaving one child, Jessie Thom or Cattanach. Janet had been married in 1852 to Donald George Cattanach, who also survived her. Had she lived, she would have attained majority in November 1854. By ante-nuptial contract of marriage she had conveyed to trustees, for the purposes therein set forth, her whole heritable and moveable estate then belonging to her, or to which she might thereafter succeed; and in particular, her right and interest in the estate of her deceased father, and of her grandaunt, the testatrix. In November 1854 the marriage contract trustees raised this action against the executors of Miss Thom, for the purpose of declaring the right of Jessie Thom Cattanach's administrator-in-law to payment of the whole funds in the hands of the executors of Miss Margaret Thom, on getting a renunciation from Miss Elizabeth Thom and Mrs Thom of all right to payment out of the executry funds of the annuity and liferent provisions settled upon them respectively. The defenders pleaded, that the right to the whole executry had not yet vested in Jessie Thom Cattanach. *Held*—That the child was clearly entitled to take the interest of its mother, which also carried the interest derived from the brother who predeceased her, and that the period of payment of that portion of the funds had arrived. But it was a question of difficulty, whether the testatrix intended that portion of the funds which was affected by the liferent to vest until the period of division arrived, which was the death of the liferentrix. The holders of the life interests had not renounced their rights in regard to it, and the period of distribution contemplated by the testatrix could never arrive, the liferentrix having survived the grandnephews and grandniece of the testatrix. The executors of the testatrix objected to part with that portion of the fund, and the case, therefore.

truly resolved into a demand by the administrator-in-law to get these funds under his own management and control, and for that purpose he was now invoking the sanction of the Court to a transaction of which the details were not before it. Therefore *quoad* that portion of the trust funds the pursuers claim refused. Expenses allowed out of that portion of the funds paid over to the administrator-in-law of Jessie Thom Cattnach.

DR ALEXANDER WOOD *v.* DR J. H. BENNETT.—July 7.

Process—Expenses—Defamation.

Dr Wood brought an action of damages against Dr Bennett for defamation. In his revised condescendence Dr Bennett stated as follows :—"The meeting of the Fellows of the College on 2d December 1856, referred to in the condescendence, being called and held for the purpose of considering whom it was proper to elect as office-bearers of the college for the ensuing year, the defender conceived that it was quite proper for him, in the circumstances, to state his opinion as to the pursuer's part in the controversy with Dr Lawrie, and as to the manner in which he had discharged the duties of secretary. His opinion and his statements had no reference, and were not intended to have any reference, to the pursuer's moral character or conduct, and he denies that he imputed, or intended to impute, falsehood or dishonesty to the pursuer; and if the words which he used were calculated to convey to the mind of any person present a different impression from that intended by him, the defender regrets it, and has accordingly taken every means in his power to remove any such erroneous impression. He here repeats what he has all along stated, that it never was in his mind to charge the pursuer with moral falsehood or dishonesty, and that, if any words fell from him which were supposed to bear such a meaning—and he is unconscious of having used such words—he withdraws them, and regrets that he should, though unintentionally, have used such words." By minute the pursuer accepted this statement as satisfactory, and the parties having renounced probation, consented that the cause, to the effect of deciding the question of expenses, should be decided on the record and productions. The defender claimed expenses because the action was for damages for slander which he said was denied by him. His admission must be taken with its qualification; and doing so, there was no ground in equity or law for finding him liable in any part of his own or the pursuer's expenses. *Held*—That each party should pay his own expenses.

FLEMING *v.* CLARKSON.—July 7.

Aliment—Personal and Transmissible.

On 30th December 1844 Fleming bore a natural child to Clarkson. In 1848 she obtained a decree of filiation against the father, decerning him to pay L.8 per annum as the aliment of the child, beginning as at 30th December 1844, and continuing until the child attained the age of seven years, reserving to the pursuer at the expiration of that time to apply for a further award of aliment. The seven years expired in 1851. During that time the aliment had been regularly paid. The father died in 1851. Thereafter the child lived in his grandfather's family, of which his mother remained a member. She was unable from bad health to do anything for her own support. The child has been maintained by the mother's family since 1851. In 1854 she raised a waking and transference against the brother and heir-at-law of the deceased father of her child. He defended on the ground that she had no title to sue, not having maintained the child at her own cost; (2.) that the claim was incompetent under the transference, the original decree having been fully implemented; (3.) that assuming the claim to be good in itself, it could not be enforced against the representative of the father, as he was under no legal obligation to maintain the natural children of his predecessor (*Morrison's Tutors v. Kerr*, 7th Dec. 1692, Dict. 1363). *Held*—That the aliment of a natural child was a proper debt which—not arising *ex delicto* or *ex debito naturali*—when once constituted, might be ranked on the father's sequestrated estate, and, like any other debt, was transmissible against the representative of the father, who was *eadem persona cum defuncto*.

JAMES M'RITCHIE v. JAMES INGLIS.—July 9.

Right of Way, etc.—Servitude—Title to Sue—Process.

M'Ritchie alleging that he was proprietor of ground at North Queensferry, described in his titles as bounded by the sea-flood on the west, applied for interdict against Inglis in respect that between the complainer's ground and the East Battery Pier there was a strip of ground which he said had been used for forty years by the inhabitants as a public road and right of way, and public bleaching, drying, recreation, and amusement ground, and that the respondent was, without any title, illegally encroaching upon this ground by his building operations. Interim interdict was granted, and a record made up, in which the complainer further averred that the respondent's operations would interfere with a pig-stye belonging to the complainer. The respondent averred that the strip of ground in question had been let to him on a long lease in December 1854, and he denied the alleged use of it by the petitioner and the public, and their right to use it. After proof—*Held*, (1.) That there being nothing in the petition to cover the averments in regard to the pig-stye, judgment upon that point would be *ultra petita*; (2.) that this was not an action which could be sustained for the vindication of a public interest, and that the complainer did not assert such an individual interest in the subject as to entitle him to take up the case on any other footing. He had not set himself forth as the proprietor of the strip of ground in question, either directly or as part and pertinent of his own ground. Nor was it said that the public had a proper right of servitude over it for the purposes specified in the petition. Besides, no such claim could be sustained; for there was no dominant tenement to which the servitude could be ascribed, and no such personal servitude was recognised by the law of Scotland.

SIR W. D. STEWART v. OFFICERS OF STATE.—July 10.

Teinds—Decimæ Inclusæ Title.

In the locality of Auchtergaven Sir William Drummond Stewart claimed exemption for the lands of Over and Nether Obney, as being teind free under a *decimæ inclusæ* grant with an exemption from payment of stipend. The title founded on by him was a charter in 1550 from the Sub-Dean and Cathedral Church of Dunkeld, *sedes vacantes* with consent of the Vicar-General and the Dean and Chapter. *Held*—That although the terms of the deed appeared to indicate that the lands fell under the class of those *cum decimis inclusis*, that was not conclusive. The right must be traced back to a right flowing from churchmen before the Act of Annexation. It was not even all churchmen to whom this power belonged. It was limited to the orders of the Cistercians, the Templars, and the Hospitallers or the Knights of St John. But Dunkeld was not one of these establishments. It was also a peculiar circumstance, that the deed was granted not by the Bishop, but only by the Sub-Dean. It was a doubtful point whether such a grant was valid. The deed was not confirmed, and in consequence of this the commissioners in 1629 rejected the claim. From that time to the present the lands had been treated as teindable subjects. There was thus a uniform train of circumstances negative of Sir William's claim to immunity.

ROBERT BELL (Jeffs' Trustee) v. WILLIAM REID.—July 14.

Evidence—Commission and Diligence—What is Railway Plant?

Thomas Jeffs, brother of the late William Jeffs, railway contractor, was appointed *factor loco tutoris* to his brother's children; but in consequence of a report by the accountant of Court, he was removed, and William Reid appointed in his stead. In an accounting, Reid charged Jeffs with having taken "possession of a large and valuable plant which belonged to the copartnership of William and Thomas Jeffs, consisting of horses, waggons, rails, and implements, used in the Company's business." A proof was allowed; and Reid being about to lead evidence as to certain stores of corn and horse provender, which he maintained belonged to the Company, the evidence was objected to by Jeffs, on the ground that "corn and horse provender" were not railway plant. On a report by the commissioner, Lord Kinloch repelled the objection. He stated, "Admittedly, the

horses were part of the plant, and equally so, the Lord Ordinary thinks, the provender stored for feeding them." On a reclaiming note by Jeffs' trustee—he himself having been sequestered—*Held*, That the objection was rightly repelled, but that it was premature to consider what was railway plant.

JAMES POTTER v. HOARE, BUXTON, AND Co.—July 15.

Arbitration—Powers of Arbitrator.

Potter having bought a cargo of timber from Hoare, Buxton, and Co., disputes arose about the price, which the parties referred to arbitration. The referee pronounced an award, which, however, did not exhaust the disputes between the parties. Hoare, Buxton, and Company brought an action against Potter for a balance of the price still unpaid; and in this action the award was founded on and treated by both parties as final, though the pursuers objected to it on the ground that they had not been heard. The Lord Ordinary, however, construed it adversely to the defender. He thereupon pleaded that it was a subsisting reference; and in respect of this plea—which was added to the record—process was sisted to allow him to take such steps in the reference, if still subsisting, as might be competent to him. The referee then, on the defender's request—the pursuers objecting—pronounced a second award, which he stated was only for the purpose of carrying out his intentions at the date of the first award. In a reduction of that second award, *Held*—That an arbitrator who has once issued a final award can neither explain it nor add to it without a new reference to him by the parties; and that in the present case there having been no such reference, the arbitrator, on pronouncing his first award, was *functus officio*, and his second award incompetent.

WILLIAM ALVES WELSH v. THE INVERNESS AND NAIRN RAILWAY COMPANY.

—July 15.

Arbitration—Railway—Lands Clauses Consolidation Act.

An agreement to refer to arbitrators, entered into between the promoters of the Inverness and Nairn Railway and a landed proprietor through whose lands the line was to pass, having been followed up, after the passing of the Company's Act, by nomination of arbitrators by both parties respectively in terms of the Lands Clauses Consolidation (Scotland) Act, 1845, and by other admitted actings of the parties, *Held*—That the landed proprietor was not entitled to demand any other or further arbitration as to his claims, or to insist that the arbitration, constituted by the nomination of arbitrators, should be subject to any other conditions or provisions than those contained in the Lands Clauses Act.

Pet.—SIR THOMAS MONCRIEFFE.—July 16.

Entail Amendment Act, 11 and 12 Vict., cap. 36, sec. 26.

An application, under sec. 26 of the 11 and 12 Vict., cap. 36, for authority to uplift and apply a sum of consigned money in repayment of certain balances of outlay on Montgomery improvements. After the petitioner's succession, he executed, prior to the passing of the Entail Amendment Act, various improvements of the nature contemplated by the Montgomery Act; and he obtained decree for three-fourths of his expenditure in 1844. In 1852, he obtained the authority of the Court to uplift certain monies consigned in bank by two railway companies for land taken from the entailed estates on repayment of the three-fourths, for which he had obtained decree; and he uplifted these monies accordingly. There remained a considerable balance of the consigned monies; and the object of the present application was to uplift it in repayment of the remaining one-fourth. The improvements to which this one-fourth of outlay was applicable, were all prior to 14th August 1848. *Held*—That under sec. 26 of the Entail Amendment Act, an heir of entail who has made improvements on an entailed estate prior to the passing of the Act is entitled to payment of his whole expenditure out of consigned money, on his showing that his improvements are permanent, and notwithstanding that he may have taken steps to obtain, or may even have obtained, decree of declarator to keep up three-fourths of these im-

provements as a personal debt against the succeeding heirs under the Montgomery Act.

SIR A. P. GORDON CUMMING v. J. E. GORDON CUMMING and OTHERS.—
July 16.

Entail—Provisions to Younger Children.

Action of declarator by an heir of entail in possession to have the rights of the younger children of his father ascertained. The late Sir W. Gordon Cumming was twice married. By his first marriage contract he provided L.12,000 "in the due and lawful exercise of" his powers under the entail, being three years' free rent, for the younger children, in the case, which happened, of there being three or more other than the heir. By the second contract of marriage he provided L.3000 to the younger children of that marriage under the Aberdeen Act, which allows three years' free rent for that purpose. Sir William died in 1854. The free rental of the estates was then estimated at L.3587. In 1830, and prior to his second marriage, Sir William obtained a private estate Act, which empowered him to charge the entail estate of Gordonstown with his debts contracted prior to the Act, as thereunto scheduled. These comprised the L.12,000 to the younger children of the first marriage. Both families now insisted on payment of their provisions in full, which three years' rent was however inadequate to meet. They pleaded that the estates were not held under entails valid in terms of the statute 1685, c. 22; and therefore, that the onerous obligations contained in their father's contracts of marriage could and ought to be made effectual against the fee of the estates—and also, that the provision of L.12,000 was a debt affecting the fee of the estate under the private Act: Therefore, assuming the validity of the entail, that the heir in possession having the power to sell or burden the estate for payment of that provision to the children of the first marriage, he was bound to exercise such power so as to enable the children of the second marriage to obtain full payment of their provision of L.3000. Pleaded for the heir in possession,—That the entails were good *inter heredes*, until challenged and set aside in a competent process, and that the estate Act was not intended to make, and did not make, any alterations on the rights of the younger children. *Held*—That the younger children were not entitled to plead the objections to the validity of the entail; and that no legal plea could be founded on the estate Act to the effect of compelling the heir in possession to increase the amount of their provisions. Therefore, that he was not bound to pay more than three years' free rents in fulfilment of the obligations undertaken by his father in his marriage contracts.

ROBINSON IBBETSON v. ALEXANDER M'Bey.—July 17.

Transaction—Sale.

Ibbetson, a cattle-dealer in Westmoreland, sold to a party, on behalf of M'Bey, certain cattle in April 1856. After the purchase the parties met at Penrith, when it was agreed that M'Bey should inspect the cattle. Admittedly, he saw the cattle, but he now denies that he inspected them. He granted a cheque for the price payable a few days thereafter. He sent for the cattle, and then stopped payment of the cheque at the bank, on the allegation that the cattle were of inferior quality. In June 1858, Ibbetson raised this action for payment. It did not appear that M'Bey offered to return the cattle. *Held*—That he was not entitled to refuse payment of the draft.

SECOND DIVISION.

LESLIE AND OTHERS v. DAVIDSON'S REPRESENTATIVES AND OTHERS.—June 16.
Expenses of Process—Taxation as between Party and Party—Counsel's Fees and Expenses of Inspecting Books of a Company with a view to prepare Defences.

In this case, the action was dismissed and the defenders found entitled to expenses. Two objections were taken to the auditor's report by the defender

Lumsden. *First*, that he had improperly disallowed a sum of L.40 or L.50, being the expenses of a journey by counsel to Aberdeen to inspect the books of the bank, with a view to the preparation of the record. This charge was said to have been reasonably and properly incurred, looking to the nature of the action and the pursuers' averments as to the state of the books. *Secondly*, that he had improperly cut down and disallowed, in whole or in part, certain fees paid to counsel for the adjustment of the record and debate. These fees were (1) certain fees to senior counsel for adjustment of the record, and for consultation before closing; and (2) the fees to counsel for debate in the Outer House, from which the auditor had struck off about twelve guineas. A majority of the Court was against the first objection, holding that the expense in question was not chargeable against the opposite party, and had therefore been properly disallowed on taxation; but the point was compromised between the parties without a judgment. The Court, by a majority, sustained the second objection, holding that, although the auditor had power to deal with fees, and to report them to the Court where excessive, the fees in question were not such as to justify interference.

WALKER v. CALEDONIAN RAILWAY COMPANY.—June 26.

Obligation—Written Contract—Proof—An omission to enter in an Interlocutor a finding that one of the parties was entitled to Expenses rectified, sometime after the Interlocutor had been signed.

After some communing between the pursuer and the defenders' secretary about a contract proposed to be entered into by the pursuer for the supply of horses to do certain haulage for the defenders, the pursuer made a written offer "to supply you with horses for haulage upon your line at the different stations shown, or to be hereafter shown to me; also, to increase the number of horses from time to time as may be required, for the sum of 6s. 8d. per horse and man per day," from 11th July 1855 for three years. The railway secretary sent a written acceptance of this offer, and on 11th July the pursuer commenced to implement his contract. In September 1856, the railway secretary gave notice that the Company did not longer require several of the horses. After some correspondence, the pursuer withdrew all his horses from the work. He then raised this action, averring, that during the communings previous to his undertaking the contract, he had been shown a list of the stations at which his horses would be required, and the number of horses and men necessary at each; that the bargain was, that at least the whole number shown in that list would be employed during the whole period of the contract; that he had suffered loss by the sale of his horses, and by the loss of the contract, and concluded for L.2000 as the amount of the damage thereby occasioned to him. The Lord Ordinary (Handyside) allowed the pursuer to lodge draft issues. The defenders reclaimed; the Court recalled the interlocutor of the Lord Ordinary, after considering draft issues lodged by the pursuer. The proposed issue referred to the list above mentioned. *Observed*, There was no reference in the contract to the list which the pursuer proposed to make a part of it. Then came the important question, Can a party be allowed to make part of a contract such previous communings as were now alleged? There was no allegation of fraud or misrepresentation. When a contract is constituted by writing, a party cannot be allowed to prove by parole what took place previous to a written offer and acceptance, in order to alter the nature of the contract as set forth in writing.

The Court found the defenders entitled to expenses; such a finding was by a clerical error neglected to be inserted in the interlocutor. Some days after it was signed, the defenders moved the Court that this omission should be rectified. The pursuer opposed it. The Court made the addition to the interlocutor craved.

WILSON OR FORREST AND OTHERS v. WILSON.—July 1.

Discharge—A Deed in favour of the Wife and Children of the Granter held to be delivered though in his own custody.

James Wilson, senior, bequeathed his whole heritable and moveable estate to his son James, under burden, *inter alia*, of a legacy of L.100 to the testator's daughter Mrs Janet Wilson or Forrest, payable "when her two daughters, Janet and Mary, come to the age of twenty-two years; but if James Wilson or his assignees shall see cause, he is not to give Janet Wilson the money, but to give her two daughters L.50 each, and Janet Wilson to have the interest of it so long as she lives." The testator's son James survived him, and died in 1854; and his nephew James Braconridge Wilson, obtained decree of special and general service as his heir-at-law, and was infeft. In 1857, Mrs Wilson or Forrest, and her husband for himself and for behoof of her and of his daughters, raised an action against James Braconridge Wilson, concluding for decree for the interest on the legacy from the death of the testator, and that the defender was bound to pay the interest so long as the principal sum remained in his hands; and to consign in bank, or otherwise secure the principal sum, until it became payable. In defence, it was alleged that James Wilson, junior, had paid the principal sum of the legacy in consideration of the pursuers' passing from their claim for interest, and of Mr Forrest disposing certain heritable property belonging to him in favour of his wife and daughters; and that a deed by which this arrangement had been given effect to was in the hands of the pursuer, Mr Forrest. A diligence was granted for the recovery of the deed. It bore that part of the money had been paid to the pursuers in two previous instalments, and that the balance was paid of the date of executing the deed. The pursuers pleaded, that the deed could not be founded on, being undelivered, and averred that it was retained by Mr Forrest in consequence of the non-payment of the sums the granter acknowledged himself to have received. The Lord Ordinary (Ardmillan) held the payment of the legacy was proved. The pursuers reclaimed, and prayed the Court to hold that the discharge by the pursuer not being delivered, could not be founded on as a voucher. The Court adhered, reserving the pursuers' title to insist in a reduction. *Observed*, The deed being in favour of the pursuer's wife and children, was, as a delivered deed, properly in his custody for their behoof.

CUNNINGHAM v. CUNNINGHAM'S TRUSTEES.—July 5.

Succession—Construction—Trust—Settlement—Conditional Legacy—Vesting.

A testator disposed his whole heritable and moveable property to trustees, for the purposes, *inter alia*, of disposing the lands of Newton to the truster's oldest son John and his heirs, whom failing, to the truster's second son George and his heirs; and for the division of the whole residue that should be in the hands of the trustees after selling the estate of Huntingtower, which also belonged to the truster, equally among the whole of the younger children, and their heirs and assignees, share and share alike, when the youngest child should arrive at majority. Following these bequests of the residue were these words:—"But in the event of any of my younger children succeeding, by destination or otherwise, to property exceeding in value by L.3000 the sum to which he or she would succeed to under these presents, then the bequest hereby conveyed in favour of such younger child shall cease and determine, and the share which would have belonged to him or her shall be divisible equally among my other children." The oldest son survived the testator; and on his death, unmarried and intestate, George, the second son, succeeded to the estate of Newton. In 1855 he raised this action, concluding for declarator, that in virtue of his father's settlement, he had succeeded to, and had right to a share of the residue of his father's estate, equally along with the other younger children; and that upon the said residue becoming divisible in 1861, when the youngest child will attain majority, he will be entitled to his said share of the residue, without reference to his having succeeded by the death of his brother to the estate of

Newton. It was averred, that the condition attached to the legacies in favour of the younger children was intended to apply in case one of them succeeded to a property which it was expected would be left to one of them by a friend, but who otherwise disposed of it. The Lord Ordinary (Neaves) *held*, that in determining whether the pursuer had succeeded to property exceeding in value by L.3000 his share of the residue, it will be proper and necessary to take into view the value of the estate of Newton. In support of a reclaiming note, it was argued for the pursuers, That the bequests of the shares of the residue being to the legatees and their heirs and assignees, these bequests vested *a morte testatoris*; and it was the intention of the truster that the condition should only take effect if the succession contemplated should occur previous to his decease. The Court adhered. *Observed*—The whole terms of the deed pointed to a vesting only at the period of distribution, as the price of an estate, the sum set apart to provide an annuity to the truster's widow, and other funds, were to form part of the residue. But though these legacies did vest *a morte testatoris*, they were still conditional legacies, and vested conditionally only, that however it was unnecessary to decide the question of vesting, as it did not arise unless the pursuer could show that the condition did not apply to the succession to the lands of Newton; that it was broad enough to do so, and did apply.—This reading was the one that tended most to the attainment of an equal division of the residue among the truster's children, which was the evident intention of the truster, the ruling principle in the construction of a family settlement being to adopt that reading which gave effect to the intentions of the truster, when these intentions were discoverable.

Authority cited for Pursuer.—Adam v. Watson and M'Dougal, 4th June 1856, xviii. D., p. 971.

Authorities cited for Defenders.—Schœniman v. Wilson, 25th June 1828, vi. S. and D., p. 1019; Lady Baillie v. Seton and Others, 16th December 1833, xvi. D., p. 216.

BELL v. WADDELL.—July 9.

Landlord and Tenant—Process—Petition for Inspection of Fences—Competency of Remit and Inspection after the Tenant had left the Farm.

Waddell was tenant of the farm of Blackhall, the property of Bell of Blackhall, in the parish of Cambusnethan, under missives of lease, by which he was bound to "keep and leave the houses and fences in sufficient tenantable condition." The lease was brought to an end at Whitsunday 1853. On 17th March 1853, Mr Bell, alleging that the fences had been neglected by Waddell, and were not in tenantable condition, presented a summary petition to the Sheriff of Lanarkshire, craving a remit to qualified persons to inspect and report upon the state of the fences; whether they were in sufficient tenantable condition, if not, what sum would be necessary to put them into such condition; and thereafter to decern and ordain Waddell to put them in proper condition immediately at the sight of such persons, and to leave them so at the expiry of his lease; and failing his doing so, to decern and ordain him to make payment to the petitioner of the sum which the said skilled persons should report as necessary and requisite for that purpose. Waddell opposed this petition, stating various preliminary and other pleas, which rendered it necessary that a record should be made up. It was not until the 24th October 1853 that the record was closed; and on that day the sheriff-substitute remitted to persons of skill to inspect and report in terms of the prayer of the petition. Further delay, however, was occasioned by a reclaiming petition for Waddell, so that it was April of the following year (1854) before any inspection was made or report returned. Meantime Waddell had removed from the farm at Whitsunday 1853; and in one of his statements on record, he averred that the fences had been, during the months that they had been out of his possession, subject to trespasses and dilapidation at the hands of colliers and others, for whom he was not responsible. The report returned under the above remit was to the effect that the fences were in a very bad state of repair and in a

neglected condition, and that it would take L.51, 9s. 3d. to put them into a tenantable and fencible condition. This report applied to the state of the fences as at the date of the inspection, viz., 6th April 1854; but, as explained in another report by the inspectors, they could find nothing to indicate that the fences were then in a worse condition than to all appearance they must have been at Whitsunday 1853. The sheriff-substitute, on advising the case with the report, pronounced an interlocutor, finding that the petitioner ought to have moved for an inspection at the very commencement of the action, reserving parties' pleas; finding, that it was impossible, on an inspection made so long after the respondent left the farm, to ascertain from the remit what was the state of the fences as at Whitsunday 1853; finding, that there could be no farther proceedings in the petition, and therefore dismissing the same, with expenses, reserving to the petitioner all competent action. The sheriff-depute, on appeal, altered this interlocutor; found the action relevant; ordained the respondent, Waddell, to put the fences in proper repair within a month, and, on his failure to do so, decerned against him, in terms of the alternative prayer of the petition, for the sum of L.50. Waddell advocated; and the Lord Ordinary (Mackenzie) recalled the interlocutor of the sheriff, and pronounced a judgment substantially the same as that of the sheriff-substitute, and substantially on the same grounds, viz., "that under the remit and reports of the inspectors, there was no proper evidence of the state of the fences at the time of the advocator's removal from the farm, and that there were no *termini habiles* for any judgment against him under the petition as framed." The Court, however, on a reclaiming petition, unanimously recalled the Lord Ordinary's interlocutor, holding that a remit for inspection is a perfectly competent, and in many cases a proper, procedure after the tenant has left the farm; that it is so, even where the petition may not have been presented until the tenant had removed from the farm; that much more was it competent in this case, where the petition had been presented two months before the expiry of the lease, where the delay in the inspection had been occasioned by the respondent, and where it was the duty of the tenant, as well as of the landlord, to keep evidence of the state of the fences at the termination of the lease. The Court also held, however, that the sheriff had gone too far in taking the reports as conclusive, without allowing the respondent any opportunity of proving his averment, that after his removal the fences were dilapidated by colliers and other trespassers. A proof was therefore allowed on this subject, and the interlocutor of the sheriff altered to that effect.

M'ARTHUR v. BROWN.—July 9.

Sale—Delivery—Ownership of goods sold under Levy Warrant to recover Excise Duties, under stat. 7 and 8 Geo. IV., cap. 53, sec. 27, but not delivered to the Purchaser—Writ of Extent.

Under a levy or distress warrant, the effects of a vintner and brewer were sold by auction for recovery of excise duties, in May 1854, to Brown; and he paid the price, but allowed the goods to remain with the owner, as a favour to him, and until he should wind up his affairs before going abroad. The goods were again attached by a poinding of the ground in July 1855, and advertised for sale by auction; an interdict of the sale was granted by the sheriff, after a proof, on the application of the party who had purchased the goods at the excise sale. In an advocacy adhering to the judgment of the Lord Ordinary (Ardmillan), the interdict was recalled by the Court, but neither party found entitled to expenses. *Observed*, The plea of the purchaser (Brown), that by some peculiar virtue in the Crown diligence, the property in the goods sold was transmitted without delivery, could not be supported. (It was unnecessary to inquire whether a writ of extent would have had that effect.) The diligence used secured a preference to the Crown, and perhaps a higher preference than could be obtained by a common poinding, but no more,—indeed, had the debtor again fallen into arrears, the same goods, if in his possession, might have been attached under a new levy warrant. An attachment of this kind

did not alter the property of goods more than any other diligence, and the sale was of goods, the property not of the pouncing creditor, but of the debtor. The sale gave a right to the purchaser, who was entitled to a reasonable time to take possession, and so complete his right, until this was done the purchaser had a *jus ad rem*, but the *jus in re* continued in the debtor, and he remained the undivested owner in all questions with third parties. There was no reason why there should be any difference between the effect of a sale by the debtor himself, and one under the diligence used by the Crown.

EDINBURGH AND GLASGOW BANK v. SAMSON AND FORBES.—July 13.

Bank—Liability of the Indorser of a bank cheque, cashed by a bank other than the bank to which it is addressed, for payment of the contents—Effect of alterations in vitiating a Cheque.

Forbes gave Samson a cheque on the Western Bank branch at Dunfermline. The cheque was indorsed by Samson, and the sum it contained paid to him by the Edinburgh and Glasgow Bank at Kinross. The cheque was marked on the corner as for L.164, but the sum filled in in the body was only "one hundred and sixty pounds." The banker at Kinross wrote to Forbes stating this, and Forbes, when next in Kinross, altered the sum in the body of the cheque to L.164. When the cheque was transmitted to Dunfermline, Forbes had no funds at his credit, and it was returned dishonoured. The Edinburgh and Glasgow Bank thereupon raised this action against Samson and Forbes, concluding against them conjointly and severally for payment of L.164, with interest from the date at which the cheque was cashed till payment. The Lord Ordinary (Ardmillan) held, that Samson, by indorsing the cheque, rendered himself liable as an obligant thereon to the pursuers, so far as the same was valid, and ordered issues for the trial of certain facts. The Court, on a reclaiming note for Samson, recalled that judgment and *assolvièd* Samson, in respect the cheque was vitiated by the alteration. *Observed* by Lord Cowan, who delivered the opinion of the Court—*Ex facie* the order was altered in its date, and the amount. Being payable on presentation, the former alteration was not an essential vitiation; but the amount of the draft was a material part of the document, and to the alteration in it special attention was due. It was averred and admitted, that after the draft was cashed there was one alteration made on it. Samson admittedly knew nothing of that alteration; and the question was, whether such an *ex facie* vitiation,—in itself enough to void the order if not explained on satisfactory grounds,—could be obviated without proving it to have been made with Samson's consent. The allegation, that the document as altered set forth the real transaction as originally intended, was irrelevant, unless the party pleading the vitiation was barred from objecting thereto by having consented to the alteration:—Both at common law and under the Stamp Acts, the alteration had destroyed the instrument as an actionable document of debt.

Authorities referred to by Lord Cowan in the course of his opinion.—i. Bell's Coms., p. 391; Byles on Bills, pp. 278–280; Tilley on the Stamp Laws, p. 196; Perring v. Hone, ii. Carr and Payne, p. 401; xii. Moore, p. 135.

PULLARS v. WALKER.—July 13.

Periculum—Proof—Onus where a Horse perishes in the hands of an intending purchaser on trial.

On 7th February 1854, J. and J. Pullars purchased a horse from Walker, at the price of L.55, under the condition that if a certain swelling, which then affected the animal, was not healed within a month, it was to be taken back, and the price repaid. After delivery and payment of the price, but before the period of a month had elapsed, Messrs Pullars intimated to Walker that the swelling had not abated, and that they were desirous he should take back the horse. On Saturday, the 25th February, Walker went to Keirfield, the residence of Messrs Pullars, and it was then arranged between the parties that that horse should be taken back, and that two other horses should be sent out on Monday, 27th February, for inspection by Messrs Pullars, and with a view

he purchase and selection of one of them, in lieu of the horse which was to be taken back. Accordingly a horse and a mare were sent on the Monday; Walker himself also went to Keirfield, and the animals were then and there selected by Messrs Pullars, who declared their preference for the horse. The price of L.55 was mentioned as the price both of the horse and of the mare; but the Messrs Pullars did not agree to give that sum, or any fixed amount. The horse affected by the swelling was then taken away; and the horse for which Messrs Pullars had declared their preference was left in their possession. Walker, on the footing that they were to have a trial of him for a fortnight, in a view to an eventual purchase, at a price to be agreed upon if he should give satisfaction. There was evidence to the effect that there had been a completed contract of sale, subject only to the condition that the horse might be returned if he should turn out not to be a good worker; but the preponderance of the evidence was held to be in favour of the view that he was left on trial for a fortnight. The horse had previously fetched L.52, 10s., and was a young one. On Wednesday, the 8th of March, the horse, while still in the possession of Messrs Pullars on the footing above-mentioned, died of acute inflammation of the intestines. He had in the meantime been put to work by them. On Monday, the 6th of March, he was, in the earlier part of the day, worked by him for five hours in the plough; and in the latter part of the day sent to a cart at Denny, a distance of ten miles, from whence he brought back a heavy load of stones through a ford, and stood in the cold for half-an-hour on the road; having thus been kept in the yoke during the day for a period altogether about fourteen hours, with only an interval of one hour's rest at mid-day. On Tuesday, the 7th, he was also at work, although for a shorter period. He was not observed to be ill till Wednesday morning, shortly before his death. Medical evidence was led to the effect, that if the inflammation had been caused by over-work or exposure on the Monday, it would have shown itself earlier; but it was not proved that the inflammation was not produced by these causes. The Sheriff-substitute and Sheriff-depute of Stirling held, that the work done on Monday, the 6th March, was an extra, or more than an ordinary day's work; but that, it not being proved that the disease, and consequently the death of the horse, was caused by that extra day's work, the loss fell on the owner, Walker. The Court, however, agreeing generally with the Lord Ordinary (Neaves), and concurring with the sheriff-substitute and sheriff-depute, in holding the work on Monday, 6th March, to be more than an ordinary day's work, held, that the Messrs Pullars were liable in the same degree of diligence and caution, at least, as in a case of hiring; that, therefore, they were bound to show that the horse had perished from some cause for which they were not responsible; and that, it not having been shown that the death of the horse was not the consequence of the over-work on the Monday, they were responsible, and must suffer the loss.

Authorities for Walker.—Bell's Commentaries, i. 453; Binny v. Veaux, 16th July 1679, M., 10,079.

HUNTER v. CHALMERS.—July 16.

Superior and Vassal—Construction of Obligation for Relief of Public Burdens—Poor-Rates.

Hunter's ancestor, in 1789, feued certain lands, now forming part of the parish of Dundee, at an annual feu-duty of L.66; by the feu-contract the superior bound himself to free and relieve the vassals of "all cess, minister's stipend, and whole other public burdens whatever, due and payable furth of or on the said lands and teinds of all time bygone, and in all time coming." The superior subfeued the lands, granting a similar obligation of relief. Up to the year 1848 the feu-duty was paid to Hunter by his vassal, without any deduction for poor-rates; after that year he claimed a deduction of the amount assessed on the land; the mode of raising the assessment in the parish where the lands are situated being one-half on heritage, the other half on means and substance. This action was raised by Hunter, concluding for declarator that

his vassal was bound to pay the feu-duty without deduction of poor-rates. It was pleaded for the pursuer, that the defender had parted with the *dominium utile*, in which circumstances the assessment was laid not on him, but on his vassals. The Lord Ordinary sustained the pleas of the defender, to the effect that under the obligation of relief in the feu-contract, the vassal was entitled to deduct the assessment on property for the poor from the feu-duty. His Lordship's opinion was principally rested on the following cases:—*Ainslie*, 19th November 1839, ii. D., p. 64; *Reid*, 16th February 1843, v. D., p. 644; and *Sprot*, vii. S. and D., p. 682. The pursuer reclaimed. The Court adhered.

THE PRESBYTERY OF DUNDEE v. THE PROVOST AND MAGISTRATES OF DUNDEE—July 20.

Expenses—Appeal.

In this action, relative to the right of the ministers of Dundee to increase stipends from certain funds, granted by charters of Queen Mary, King James VI., and King Charles I., for pious uses, the pursuers (the ministers) were successful, and were found entitled to expenses, and decree therefor was given in their favour:—leave to appeal was refused until certain proceedings were taken so as to exhaust the case. The defenders pleaded, that it being their intention to take the case by appeal to the House of Lords, the pursuers ought to find caution for repayment of the expenses in case of a reversal. The Court decreed for expenses, but superseded extract till caution was found as craved.

M'NEILL v. MACNEAL.

Positive Prescription—Stat. 1617, c. 12.

By a marriage contract, lands were disposed to the heirs male of the marriage, whom failing, to the nearest lawful heirs male of the husband. He was survived by a son, who succeeded; and on his death his son made up a title by special service as his nearest and lawful heir male, but not as heir male of provision, and was infeft on a precept from Chancery in 1788. He executed an entail in favour of an illegitimate son and series of heirs, and died in 1818. In the same year the son was infeft as an heir of entail. In 1854 the lawful heir under the destination in the marriage contract raised a reduction of the title. *Held*, affirming the judgment of Lord Handyside (Ordinary)—That this was not a case of double title in the defender's father, and that the defender had a good title to exclude, founded on the sasines of his father and himself, fortified by the positive prescription; the defender being entitled to plead his father's possession for the period subsequent to his father's sasine as making up the period of prescription, although, until his father's death, no one could pretend a better title; and the pursuer's plea of *non valens agere* was repelled, it being held that it could not be maintained in answer to the positive prescription.

Authorities.—*Stair's Inst.*, L. 2, 12, sec. 27; *Ersk. Inst.*, iii. 6, sec. 37; *Gray and Smith v. Bogle*, 30th June 1732, M., p. 10,803; *Macdougall v. Macdougall*, 10th July 1739, M., p. 10,953; *Campbell of Ottar v. Campbell*, 7th August 1766, in H. L., 10th February 1770, ii. *Paton's Appeals*, p. 193; *Millar v. Dickson*, 7th February 1766, M., p. 10,937; *Durham v. Durham*, 24th November 1802, M., p. 11,220; ii. *Ross' Leading Cases*, p. 582; *Quille v. Morison*, 4th March 1813, Fac. Col.; *Maule v. Maule*, 4th March 1829, vii. S. and D., p. 527; *Innes v. Innes*, 15th February 1695, M., p. 11,212; *Bell's Principles*, secs. 2020, 2023; *Waddell v. Pollock*, 19th June 1823, vi. S. and D., p. 999; iii. *Ross' Leading Cases*, p. 577; *Wilson v. Pollock*, 29th Nov. 1839, ii. D., p. 159; iii. *Ross' Leading Cases*, p. 571.

This case, decided on 4th March, was omitted.

APPEAL IN THE HOUSE OF LORDS.

HAMILTON v. ANDERSON.

Sheriff—Procurator—Suspension from Office—Privilege.

(Court of Session, 11th June 1856, 18 D. 1003.—House of Lords, 18th June 1858.)

The question in this case was, whether an action of damages is competent against a sheriff-substitute, for pronouncing a sentence of suspension, while acting in his judicial capacity, against a procurator in his court, in consequence of the conduct of the procurator while managing a depending cause—malice and want of probable cause being alleged in general terms. Sheriff Anderson, of Kilmarnock, granted *ad interim* interdict on the application of the proprietor of a coal-field against his tenants. Shortly afterwards the landlord issued an ordinary summons in the Sheriff Court, and defences were lodged by Mr Hamilton, the appellant, as agent for the tenants, containing this passage:—"Your Lordship granted the petition for interdict *without hearing the defenders*, but it has been finally disposed of by an eminent engineer to whom it is referred." The sheriff-substitute, on adjusting the record, objected to the words "without hearing the defenders," and made an interlocutor "ordaining the defenders to expunge those words." The sheriff-substitute added a note to the effect "that the statement was not only untrue in itself, but, from the view of the defenders at the discussion, obviously intended as disrespectful to the Court—that the procurator ought to know that an interim interdict is always granted without hearing evidence if a *prima facie* case is stated." Mr Hamilton tendered an explanatory minute in process, "declining to expunge the passage for several reasons—viz., that it was relevant, true, and not disrespectful." The sheriff-substitute refused to receive this minute, and a fortnight afterwards, on the case being again called, another procurator, Mr Andrews, appeared instead of Mr Hamilton, and said he had no instructions to expunge the statement. The sheriff-substitute then pronounced an interlocutor suspending Mr Hamilton from exercising his functions as a procurator in that court for one month. The sheriff-depute, on appeal a week after, recalled the interlocutor, and reinstated Mr Hamilton. Mr Hamilton then raised the present action of declarator, reduction, and damages, against the sheriff-substitute. Lord Ordinary Ardmillan found that the interlocutor in question was judicial act, and competent; and that no action could be maintained in respect of it. The Lords of the Second Division adhered, and the pursuer now appealed to the House of Lords.

Lord-Advocate Inglis and Solicitor-General Cairns, for the appellant, contended that the sheriff-substitute had exceeded his duty, and had come to a monstrous decision in punishing the appellant for an act which his clients alone could be compelled, and which they declined to do; that the sheriff had proceeded on a ridiculous fancy that certain phrases in the record involved some disrespect towards himself, and that he had thereby subjected himself to damages by this incompetent proceeding of suspension.

Sir R. Bethell, Q.C., and Mr R. Palmer, Q.C., for the respondent, were not called upon.

The LORD CHANCELLOR said, he could not help regretting that, in the first place, the sheriff should have taken umbrage at the statement in question; and, secondly, that Mr Hamilton should not have at once consented to strike out the passage objected to, for it was in no way material to the record. Though it was to be regretted the sheriff should have viewed the matter in the light in which he had done, still there may have been circumstances which led him to regard it more seriously than it deserved. The appellant now says that it was his clients and not himself who were called on to do the act; and as they declined, he had no business to comply; and therefore there was no

ground for punishing him by suspension. There could be no doubt, however, that it was the procurator himself who was the author of the statement; and indeed he assumed the authorship, and tried to justify it. Nor could there be any doubt of the power of a sheriff-substitute to suspend a procurator for any contempt of court, for such power was necessarily inherent in all courts of that importance. The conduct of both parties was to be deeply regretted. The sheriff might, instead of insisting on the appellant expunging the passage, have expunged it himself; and, on the other hand, it was to be regretted that the appellant did not comply when requested to do so. A little yielding on both sides would have avoided all this disagreeable litigation. At the same time, the sheriff had acted within the limits of his power as a judge; and as there was no allegation of express malice, there could be no action brought against him for so acting. The appeal must therefore be dismissed with costs.

LORD BROUGHAM concurred.

LORD CRANWORTH said that this was in some respects an entirely novel case, for it was an illustration of an action brought against a judge, not for something done extrajudicially, but because an order had been made in a cause, which, in the opinion of one of the parties, was not correct. Now, if such an action would lie, there might be no end to such actions, for there never was a case in which one of the parties did not form a very strong opinion that the judge had decided wrongly. He did not entirely justify the sheriff in having made the order in the first instance, and in taking the view he did; at the same time it was competent for him to do what had been done. And as there was no foundation for this appeal, it must be dismissed with costs.

Affirmed with costs.

THE

JOURNAL OF JURISPRUDENCE.

PRIVILEGED CRIMES.

The boundaries of criminal law and morality are fluctuating and hard to settle. They change in every era of a people's development, and vibrate into each other in all ages. Between them there is a sort of neutral ground where the moral code disapproves of actions which the criminal code does not punish, and this neutral ground expands with civilisation and the growth of sound principles as to the interference and individual liberty. Political and other philosophies raise and discuss the questions—Ought that class of actions to be visited with punishment? Can they be prevented by it? Is its prevention worth its cost? Do they threaten the best interests of society; or are they indifferent to such interests, and obnoxious only to peculiar opinions? Is it for the welfare and comfort of the society to put them down, or to tolerate them? In primitive and barbarous times, every matter of conduct is regulated by express law, from the ceremonies of religion down to dress. Killing a cat, or slaying a full-grown, and therefore sacred, boudrons, in ancient Egypt, was visited with death; and among many Asiatic nations the same punishment has been dealt out to one wilfully or inadvertently guilty of disrespect to some dirty little idol, the value of which in a bazaar would not be above sixpence. Against the most exact and indisputable department of science, an edict of Diocletian, one of the wisest Roman emperors, runs thus: "*Ars autem mathematica damnabilis est et interdicta omnino.*" Prosecution for witchcraft and sorcery hung over the discoverers of gunpowder and the printing-press, the chief agents of civilisation, in ages when the steam-engine and electric telegraph would have led their inventors to the stake. But civilisation tends to freedom, and is possible only in the free, whether it be exemplified in mathematics or millinery.

Our worthy forefathers did a good deal of barbarian law-making in their day. With due gravity and deliberation they denounced punishments against witchcraft, heresy, profane swearing, Sabbath-breaking, and reviling the Church and the king. In their ignorance, they made laws which no human intelligence could successfully administer or enforce, and which were not worth enforcing, as they were directed against customs, acts, or opinions of no material moment to society. What the worse are we though our eyes are dazzled and our fancies amused by fashions in dress, that Puritans and Covenanters would have looked at with horror, and passed severe laws to restrain,—though our young men use emphatic expressions, in the ordinary course of conversation, which two centuries ago would have placed them in the stocks, and give vent to opinions that would have exalted them to Thomas Aikenhead's gallows? We are not the worse, but the better: we have grown to understand the difference between what may be permitted and what cannot be permitted,—between what is indifferent to the public weal and what is absolutely essential to it; and we have out-grown that state of culture where law leaves nothing to the good sense and free, intelligent choice of individuals, and where mental and physical energy are paralysed by absurd rules, established without common consent, and requiring obedience without examination.

To compel men to be virtuous is not possible, and to try is foolish: therefore most even of the graver vices are well let alone by legislators and ministers of justice. They could not successfully interfere to exterminate ingratitude, uncharitableness, greed, pride, envy, and lying for amusement, and not for any onerous consideration. Their interference would foster respectable hypocrisy only, and not virtue; and hypocrisy is not worth the cost of rearing,—at least, it ought not to be forced at the public expense, but left to private enterprise, which has in all ages been found to produce an ample supply.

Our ideas of what a crime ought to be in its essentials have been thoroughly sifted and tested by long experience; and while it need not be concealed that there are statutory offences which reason and justice repudiate, and which they will eventually abolish, there is no crime at common law which will not bear the strictest philosophical examination. A crime at common law is an immoral act with three constant characteristics: (1.) It is an act prejudicial to the interests of society, inasmuch as it injures some member of society in his person or in his property; (2.) It is an act capable of satisfactory legal proof, inasmuch as evil intent is manifested in it by external acts, and not in thought alone; and (3.) It is an act, from the doing of which punishment will operate as a deterrent upon the mind of a responsible being, capable of apprehending means and ends, and seeking after happiness under the guidance of right reason. More briefly, a crime is injurious to society, proveable beyond doubt, and avoidable by a rational mind aware of all the consequences. The

man who commits murder injures society by depriving it of the industry of one of its members, and by exciting in the minds of all that feeling of insecurity and danger which it is the object of good government to dispel. Out of this selfish desire of personal security, no doubt, springs the impulse to punish; for the loss of one member of society would be an argument rather for sparing the murderer, than for throwing away the industrial capabilities of another. And so, for the safety of person and property, it is believed to be expedient to punish rape, cutting and stabbing, wilful re-raising, forgery, theft, and the like. The mere intention to commit any of these crimes, unless it plainly manifest itself in some outward act, some deed distinct and objective, is nothing in the eye of the law, whatever it may be in the eye of morality, since it is not man to discover intention which does not pass into action, and see no man can effectually restrain his thoughts, whatever he may for his acts. A crime must not be planned merely, it must be perpetrated: it must not be perpetrated merely, it must be perpetrated intentionally, and by an individual capable of forming a deliberate intention, and who is on that account legally and morally responsible. Punishment will not deter from the commission of crime a person incapable of distinguishing right from wrong, and understanding the relation between an offence and its punishment; nor will punishment deter from the commission of secret crimes, where the chance of detection is so very small that the inattentive and unwary only are detected, and the moderately circumvent escape. Then, again, the evil intention must be unmistakably manifested. A man may murder with his sneers and insults; and by conduct of an equivocal character he may injure certain members of society more in health and happiness than if he used open violence. But the law sees what is open only, and is blind to the equivocal, the doubtful, and the inextricably obscure. Where, from the nature of the crime, the proof of it must always be difficult and generally impossible, it is better that law should overlook an offence, conviction for which must necessarily be an accident, than that it is the *certainly* of punishment that makes it effectual as a deterrent, every intending criminal looking rather to the chances of escape than of detection; and the only worthy object of criminal law to overawe the many and to punish the few, and as Cicero, with a keenness unusual for him expresses it, *ut metus ad omnes, poena ad malos pervenisset*, which can never happen when it is clear to the apprehension of all that a total want of circumspection alone can expose to detection and punishment. The fact is, that in every country, as well as Sparta, rogues are not punished for their roguery, but for being caught in it.

Hence there are some offences against the moral law which do not completely fulfil these three criteria of crime, and which are, therefore, so far as human law is concerned, privileged crimes. Some of them do little appreciable injury to society; some of them

are incapable of conclusive proof; some of them carry their punishment along with them so surely, that the punishment of the law is useless or impossible. To calm reason, it will appear that to punish the suicide is impossible; and that exclusion of his body from the churchyard, burial at cross-roads with a stake through his breast, and like contumely, are ineffably vain and unwise. Painful this public insult may be to his friends and relations, who deserve no punishment, but who rather deserve pity and kind consideration; but to him it is a matter, perhaps, of ignorance, certainly of indifference, whether the elaborate impotence of law be wreaked upon his remains, or upon the worn-out clothes he laid aside seven years before he abandoned his vesture of flesh. The suicide robs society of the fruits of his life; but can society punish him after he has braved death, and put himself beyond the reach of pleasure or pain? Can society do anything to prevent others from following him, and with drawing out of the jurisdiction of human tribunals? Oftener than once, in the course of human experience, when suicide ran a risk of becoming fashionable, and some temporary tide of vanity prompted to its commission, exposing the bodies of suicides to public indignity has had a very palpable influence in abolishing the fashion; but, as a general rule, the love of life is the master-motive either to urge or restrain; and when it fails, nothing else need be appealed to. Our Scottish lawyers have long been of this opinion, though English lawyers and law-givers, taking advantage of the not insignificant effect of barbarous show upon the English mind, deny the ordinary rites of burial to the suicide. The Omniscient, who placed the suicide at his post, alone can judge why he left it, and punish him if he has done amiss; for human intellect cannot penetrate the mysteries of his deed, nor human impotence put forth upon him its arm of vengeance into the region beyond death.

Nor does it appear that to punish attempts at suicide would serve any good end. Attempted suicide may be called attempted murder, as is done by our able but paradoxical Sir George Mackenzie, and punished severely. If it be punished with death (which attempted murder is not in our country), then the suicide attains his object at last after some disagreeable delay. If it be punished severely, where is the advantage of making life unpleasant to one to whom life was intolerable before? It only adds a slight additional reason to induce him to try again, on the supposition that he is capable of reasoning, which few are who attempt suicide. Sham attempts at suicide, gone about with due regard to personal safety, and on purpose to excite compassion, may, of course, be put down by punishment, as well as any other imposture; but to suspect them is venturing upon dangerous ground. As to self-mutilation, it is a crime of rare occurrence, and, in general, sufficiently punished in itself, if not the act of a person who is irresponsible, and may, therefore, justly be classed among privileged crimes.

One mode of committing suicide law might interfere with con-

siderable effect to prevent ; and that is, the mode of drinking one's self to death by the constant and immoderate use of spirits. Morally, this mode of committing suicide by drink, is quite as great a crime as by prussic acid, and perhaps greater ; for the one way is far more deliberate than the other. But then this crime does not satisfy the three tests. Drinking to mortal excess could not be easily proved, since constitutions vary so much, and the length of time to be included in an indictment for it would be so very considerable. Besides, what is the value of a sot's life to society, that society should be at any large expense or trouble about it ? And where is the prospect that punishment would deter others from this same crime ? Not punishment, but restraint, will require to be the cure here ; and by and by we must have some scheme for enabling the friends of oinomaniacs to shut them up in a temperance or teetotal bedlam, should they think it more consistent with right feeling, or more economical so to shut them up, than to allow them to drink themselves out of existence. Obviously enough, society cannot be at the expense of watching these useless members, or punishing them for what they cannot or will not help doing to themselves. When they proceed to do violence to the property or persons of others, it is time for society to interfere ; and with us society does interfere rather unmercifully sometimes, on the hypothesis that oinomaniacs are responsible and rational beings, whereas in truth they often are not.

Another crime against morality, allied to self-mutilation, and privileged as yet in both Scotland and England, is that of a woman causing herself to abort, or part with the fœtus in her womb. So far as we know, no woman has ever been tried and punished for this offence against morality in any country in the world. The Greek sages rather approved of this method of limiting population, and the Roman moralists declaimed against it to little purpose. Cicero, in a blaze of rhetoric, maintains that it is a crime which ought to be punished with death ; and Ovid, in his voluptuous verses, strongly disapproves of it, and with the bold licence of poetry asserts, that the woman who invented it should have perished in the womb by her own tactics (*suâ militiâ*). But neither eloquence nor poetry kept the practice within moderate bounds, or rendered its discovery a public shame. Juvenal, with a savage irony, exhorts the Roman cuckolds never to let their wives want for drugs, if they had any scruples about seeing their estates go to the sons of Ethiopians ; and Seneca, aware of the prevalence of the practice, thought it no indelicacy, in his *Consolatio ad Helviam*, to enumerate among his mother's virtues, that, unlike other Roman matrons, she never destroyed the embryo in her womb to preserve her figure. That law could have cured immorality of this wide-spread and gross character is not to be believed. Law is the expression of the will of the many as to what may be the limit beyond decency which it becomes penal to trespass ; so, when it is for the convenience or pleasure of the

many to gratify any vice, it will never be effectually prohibited by criminal law. Our ideas of decency, if not of morality, are different, as we do not take them from the private character of Jupiter and his relatives; and it has been rightly established with us, that the individual who, with a felonious purpose, by drugs or instruments, causes a woman to abort, is liable to a severe punishment. But the woman herself has been hitherto a privileged criminal. She puts her life in peril; and if she be willing to run that risk, she will most probably be willing to run all risks. No dread of punishment could be expected to deter her, and she can calculate upon an almost certain escape from detection. She is bent on hiding her shame, and she works in secret. The methods she adopts may be in themselves innocent, such as leaping, dancing, or the use of purgatives; and from innocent instruments, how can a guilty intention be safely inferred! Plainly, punishment would only overtake the simple and unwary, and the dread of it could not weigh a feather against the impulses that drive to the crime, with the chances of success in the attempt and self-destruction about equal. So far self-abortion does not meet the criteria of crime; and political economy may ask with harshness, yet not without reason—What is the value to society of a child begotten in illicit passion, stamped in the coarsest die of appetite, the fountain of whose existence is poisoned by its mother's shame, terror, and despair?

Recently, the privilege of a pregnant woman to attempt to procure abortion was made the subject of discussion in the High Court of Justiciary, in the case of Jessie Webster (May 24, 1858), who was alleged to have taken a quantity, "to the prosecutor unknown," of powder of savin, gamboge, and colocynth, to cause herself to abort, but without success. It was argued for her, that this was no crime at all,—it having never been held to be so as yet, and it being from its nature incapable of proof, injurious only to the woman, and so dangerous and so secure from detection, that no punishment could have the least effect towards its prevention. Unfortunately, no decision was given, as the indictment was withdrawn on account of indications of opinion, given from the Bench, in favour of objections taken to the minor, in respect that it gave no idea of the age of the fœtus, and averred nothing as to the character or quantity of the drugs; and the panel has not been re-indicted. Most probably it would be held that an attempt of this nature is a crime, since it would be conducive to good morals and decency that law should make women very circumspect in such matters, even though law cannot prevent such attempts from being made in secret. But really it is a difficult business to settle, in a rational manner, those rights of the homunculus, about which Sterne, in his "Tristram Shandy," makes so merry. Tertullian's proposition, *homo est qui futurus est*, though admirable in declamation, is questionable both in moral philosophy and microscopic physiology. And if wilful foeticide be held criminal on the part of the mother, why

ould not culpable foeticide be made a ground of indictment against those ladies who dance and ride, and bring on abortions and miscarriages by their recklessness? For the criminal jurist, this part of the neutral ground is hard and barren, however fertile it may be for preachers and moralists. And to preachers and moralists it had better be left. They may educate the people, and accomplish by intelligence and reason what the terrors of the law cannot accomplish. The prevalence of such a crime in any nation is most minous: it indicates unmistakeably a rotten state of society, which requires far deeper alteration and amendment than in its criminal code. Those vain Roman matrons who preferred a graceful waist to offspring, that would rise to serve the State in peace or war, were ringing the spoiler upon Rome, after their graceful waists had collapsed to the five lumbar vertebræ and a few pinches of dust.

Strong opinions have been expressed by some moralists as to the criminality of seduction, and by none stronger than Paley,¹ who was far from an ascetic, or likely to adopt severe views of any innocent pleasure. He avers that "the seducer practises the same stratagems to draw a woman's person into his power, that a swindler does to get possession of your goods or your money;" that the seducer's fraud is the most criminal of all frauds, "as the injury effected by it is greater, continues longer, and less admits reparation;" that no loss of fortune by forgery or robbery could create equal affliction and distress to a father or a brother;" and he maintains that "the seducer is answerable for the multiplied evils to which his crime gives birth;" and concludes, that "if we pursue the effects of seduction through the complicated misery which it occasions, and if it be right to estimate crimes by the mischief they knowingly produce, it will appear something more than mere invective to assert, that not one-half of the crimes for which men suffer death by the laws of England are so flagitious as this."

There is not a little force in the reasoning of this moralist; but here are grave difficulties in the way of ranking seduction among venishable crimes. There is a difficulty as to proof, since the seducer's arts extend over a course of time, and are not practised before observant witnesses, but practised before one entranced witness only, who takes them as the genuine product of affection, or she would not be deceived by them. And then who can determine how far they have succeeded, and discriminate between coquetry and virtue? Would the most deeply injured complain, or would she not rather hide her shame in secret? In Scotland, where actions of damages for seduction, though competent, are very uncommon, we can hardly conceive of a modest woman applying to the criminal law for vengeance upon her betrayer; we can conceive of women of facile virtue exceedingly eager to vindicate their overreached simplicity in a witness-box. The crime of rape is, in general, not easily proved, ex-

¹ Moral Philosophy, iii. 3. sect. 4.

cept when stupefying drugs are used,—it being difficult to ascertain whether resistance has not been given up; but how much more difficult is it to ascertain to what degree the victim of the seducer has been deceived? That woman is weak indeed, who believes the representations on which she is asked to give away her virtue; for, with deference to the shrewdness of Dr Paley, female virtue is known by all to be very unlike “your goods or your money,” which are understood to be marketable articles, the very mention of parting with which is not an insult of the grossest character. Besides, men are not the only seducers; and how could guilt be proved against a distinguished person like Lady Potiphar? From reflections like these, it becomes apparent that seduction is a crime incapable of proof; and when that is so, it is of little consequence to consider that it is a crime unpreventable by punishment.

Another crime unpreventable by punishment, according to the results of experience and all reasonable probabilities, but as yet not a privileged crime, is the very common offence of theft by a prostitute from the person of her temporary paramour. No trials are more common in our justiciary courts than those of prostitutes, for stealing money or other valuables from men who have been in their society for a purpose which the law winks at, but cannot approve of. The evidence against one of these poor creatures is always of the most meagre and unsatisfactory kind: the recollection of a drunk man being the usual proof of identity, and the strongest element of proof against her being a part of the stolen property found in a room to which she has access with another eight or ten. Evidence of opportunity seems to be accepted by many juries as quite enough; and their principle of judgment is, that a prostitute will steal if she has the chance. That principle is founded on truth; but it is not the principle of the criminal law, or no jury could ever have the opportunity of applying it; for the individual that commits crime at every opportunity, is no more responsible than the gunpowder which explodes at the touch of fire, especially when the opportunity is not of the woman's own making, but is made for her by some man as brutish and vicious as herself, and, unlike her, without the excuse of misfortune. And yet the time of juries and judges is taken up to see that the opportunity to steal is proved, regardless of the declarations of young counsel, talking without pay or hope, to show that proof of opportunity is not enough; and after a verdict of guilty, returned without a minute's deliberation, the judge sentences a poor girl of eighteen, tried for the first time, perhaps, to three or four years' penal servitude, because, forsooth, she could not resist the temptation of stealing the L.80 or L.100, which the lust of some debauchee placed within her reach; whereas if said debauchee had been a little less wealthy, or a little more prudent, she might have had the chance of stealing only a few shillings, and been sentenced in a police court to a few days' imprisonment. It is very hard for the outcasts of society thus to bear the sins of others; but there are

few more useless occupations under the sun than that of judges and juries condemning prostitutes to penal servitude for theft, and few more useless expenditures of public time and money. The law of supply and demand draws down others into their place; and the moral nature of a woman being, in general, lost with her chastity, they steal like the others, who went before them to punishment, whenever opportunity offers. To make prostitutes honest by this method, is as hopeless as to purify the Clyde by throwing a few bucketfuls of its dirty water occasionally upon the land. The bucketfuls are not missed in the river, and they run back to it in a little while as dirty as before. It is time to ask seriously, what is the use of punishing prostitutes for what they cannot well help, and certainly never will help? Is that an object on which to expend the time of jurymen, and public money in fiscal's salary and witnesses' charges? It has one effect only, and that is, to encourage prostitutes, by giving such security as the law can, that the property of whoremongers shall be safe. And this is not a very consistent attitude for our enlightened country to assume, although it has done so unconsciously, from a resolution to be blind altogether to the existence of prostitution. It takes care of the money of lusty gentlemen, and takes no care of their health, by using means to prevent diseases that lurk in and destroy the constitutions of themselves, their children, and grandchildren. Why should our law encourage prostitution itself, and seek only to prevent its *minor* evils? For what is the loss of L.100, to the loss of health and soundness of the ones? We point out this anomaly, and dare to suggest what may appear to be very paradoxical, that it would be an improvement in our criminal law, and greatly conducive to morality, to direct juries to acquit every prostitute accused of theft, if they should come to be satisfied that she stole from the person of a man who was in her company for immoral purposes. The whoremonger has no right to have property, which *he himself places in jeopardy*, protected at the expense of society; and society has the less reason to attempt it, that it cannot be done. It is enough that he has a civil action for restoration; sufficient punishment for the poor thief that she be compelled to restore her booty. That this suggestion of granting immunity from punishment should be acted on at an early date, is not among our hopes; but we shall be satisfied if these considerations have any effect towards moderating the severity of some judges, and of suggesting caution to those self-righteous juries, who are unable to take in any idea of the possible innocence of an unfortunate, and generally much-to-be-pitied woman.

Of late it has been a widely agitated question, whether the negligence of the directors of banking or other public companies, which has proved signally injurious to the interests of shareholders, ought to constitute a real or a privileged crime. These directors, as a matter of duty, ought to ascertain the gains and losses of the com-

pany, and the general state of their affairs, and report thereon. If they do not discharge this duty for themselves, but leave it to a servant who deceives them; and they, being themselves deceived in the first instance, deceive the members of the public who become shareholders, and purchase at a high price what is worth next to nothing, or less than nothing, are they, in this neglect of duty which is ruinous to others, guilty of a crime? If they purposely and knowingly deceive parties, by declaring dividends out of capital and the like, into becoming shareholders, then they are clearly guilty of fraud. Conspiracy to defraud, which is simply conjoint fraudulent intention manifested by common acts, is the crime of which the Royal British Bank Directors were found guilty, and in his charge Lord Campbell stated to the jury what was consistent with the principles of Scotch as well as English law, that in order to find them guilty, the jury must be satisfied of three things—(1.) That at a certain date the Bank was insolvent; (2.) That the Directors knew of the insolvency; and (3.) That they concealed the insolvency, and represented that the Bank was in a prosperous condition, by paying dividend out of alleged profits, when no profits had been made from new shares, and the like. They made false representations, knowing them to be false, or they would have escaped. If they had received the false statements at second hand, and repeated them, merely suspecting that they were false, that would not have been enough; for the prosecution, it was necessary to prove positive guilty knowledge, which was not easily done, but which could be safely inferred from facts and circumstances. Between this gigantic swindling and swindling on a small scale, there is no distinction in principle. But if the Directors are free of evil purpose, and ignorantly certify as true on trust what they ought to have ascertained as matter of fact, and profess to have so ascertained, does this neglect of duty, and false profession of having discharged their duty, render them amenable to criminal law? Culpable neglect does in more than one instance constitute crime. Killing through negligence, without intention, is culpable homicide. And the distinction is rather delicate between the railway pointsman, whose negligence causes the destruction of property and the permanent maiming of person, and the Bank Directors, whose negligence destroys the hard-earned savings of the poor, squanders the earthly all of helpless women, and sends many a ruined wretch to a lunatic's cell or to the grave. But then, if injury to property ensue through the *carelessness of a servant*, chosen by the person whose property is destroyed, it becomes a delicate task for law to visit upon the servant the consequence of the master's unlucky choice, as well as of his own carelessness. Law had better decline such a task, and allow the master to suffer for his error in judgment, because he has failed to use that vigilance which no one can use for him. This consideration goes at once to the heart of the question, as to whether or not negligent bank directors are privileged criminals. They are chosen by the shareholders as

their servants, and remunerated as such. They may have various intellectual qualifications for their work, and they generally, if not universally, have the most necessary of all qualifications,—sufficient property to repair the damage done through their failure of duty, which, like trustees and other parties who, with or without remuneration, undertake to perform certain work, they are no doubt liable to do. Civil liability is perfectly adequate to protect the interests of society, and to deter others from like gross or total neglect of duty, and nothing further is required,—there being no felonious intention to defraud, and the neglect being sufficiently punished by its civil consequences, as self-mutilation is by its physical consequences.

If we apply these tests for crime to some offences constituted by statute, we should find either that they are no crimes at all, or ought to be privileged crimes. For example, these tests would make short work with offences against game, and against that modern directory for tippling in season, known as Forbes Mackenzie's Act. Of such barbarous interferences of the governing power with the governed, the worthless but costly results are contempt for law in general, perjury to obtain proof, the oppression of the unlucky few, the impunity of the many, sure loss of public cash and of private character. To the ear of reason, the mew of a sacred Egyptian cat and the cry of a sacred British partridge, sound very much alike.

It is an index of enlightenment and freedom not to punish doubtful or debateable crimes. The machinery of criminal justice is necessarily imperfect in its structure and uncertain in its operation,—oftentimes allowing the guilty to escape, sometimes punishing the innocent, and never adjusting the amount of punishment to the measure of guilt. For who can see into the human spirit, and estimate exactly the felonious intention which constitutes guilt?

“ Who knows the heart, 'tis He alone
Decidedly can try us;
He knows each spring, its various tone,
Each chord, its various bias.
Then *at the balance let's be mute,*
We never can adjust it;
What's done, we partly may compute,
But know not what's resisted.”

Who can discover and make due allowance for the victim of circumstances, born with a diseased or brutish brain, and reared in savage ignorance? Man cannot; and therefore he wisely abstains from interfering with the conduct of his fellows, so long as it is not dangerous to himself and others. Retaliation for every apparent delinquency, besides being somewhat useless, would be more troublesome than the delinquencies themselves; and in the pursuit of a moderate degree of happiness, which is all we can attain, we frustrate the end in view, and reap the misery of disappointment only by efforts after the unattainable. Expediency, as well as charity, warns us to leave many of the foibles and frailties of others, against which our moral nature protests, to the judgment of Omniscience, with

whose infinite wisdom alone just judgment is possible. In His providence, justice is done, though we are unable to trace it, and have our faith shaken by the spectacle of single sinners favoured by fortune, and vast catastrophes in which the innocent perish with the guilty. In history, we can see retribution fall upon masses of men, vice eating out the vitals of nations, and self-abasement inclining the neck of the children of brave fathers to the despot's yoke. An unhappy blind Samson, an oppressed uneducated people, grinds at the mill for idle and luxurious nobles and kings, given up to the pleasures of sensuality, until, in the moment of doom, this blind Samson, groping in darkness for relief, tears the pillars of the State asunder, and buries all in the bloody chaos of a French Revolution. But credulity must be greatly in excess of charity, where retributive justice is seen to overtake individuals, and crush them beneath a tower of Siloam, or in any other conspicuous way. One truth there is, however, never to be forgotten, and that is, that man does not suffer in his body and outward estate alone, for the sufferings of the mind immeasurably surpass those of the body; and there is no finery of raiment, no thickness of baronial walls, that can shut out the punitive demons of remorse from the mind that is conscious of having done wickedly.

WHAT ARE ACTIONABLE WORDS?

LORD ELLENBOROUGH, it is reported, once defined libel to be "anything which hurt the feelings of anybody." This definition, if tradition have handed it correctly down, is hardly more extensive than the well-known one which Bentham, half in spite, half in earnest, launched against the English law. Libel, he said, is "anything which anybody, at any time, may be pleased to dislike for any reason." Those who in the present day re-echo, as far as may now be tolerated, the praises which former lawyers were wont to bestow on English law, as the "perfection of human reason," admit and justify the laxity. The *Quarterly Review* (vol. xxxv., p. 571) describes—it cannot be said, defines—libel as "that, and that only, which twelve impartial citizens declare on oath to be libel." Nor is Scottish law less vague. "Here," said Lord Chief-Commissioner Adam, "anything that produces uneasiness of mind is actionable" (*Mackenzie v. Murray*, 1819, 2 Murray, 155). It seems to be undoubted that in England, for any words, however trivial and frivolous, if they be only written, and in Scotland, for any words, whether written or spoken, a pursuer may inflict upon a defender the expense and annoyance of a jury trial, and trust to the eloquence of his counsel, and the chapter of accidents, for damages. It is true that there are many checks upon too indiscriminate a use of the action of damages for defamation. The principal of these are the heavy expense of the litigation, and the unsparing contempt

with which the public and the profession generally visit the litigants. But these checks are far from being always effectual. It is unfortunate that lawyers are to be found able to arrange any little difficulty as to expenses, and litigants so ill-tempered, and so deaf to all opinion, as to be little alive to the salutary influence of the contempt of others. Besides, in an action for defamation, the chances are too much in favour of the pursuer. Words, however innocent, are dwelt upon, and repeated, and criticised, by Court, counsel, and witnesses, till the jury fancy there is something mysterious about them—some deep, hidden, malevolent meaning,—and award damages accordingly. Cases are known to every one—although at present we do not care to specify them—which should either never have been suffered to be tried at all, or in which damages altogether disproportioned to the injury done have been awarded.

It was with the view of checking the number of frivolous actions, that in England a distinction has been taken between written and spoken defamation. In the latter, there are two sets of words,—one set actionable of themselves, and the other, only on proof of special damage done. It is evident, that if defamatory words can be thus divided, it is desirable to do so; but it is difficult to see why the principle of division should be applied to spoken words alone. The distinction seems to have had its origin in the eighteenth century. Before that, the English judges appear to have exercised a discretionary power of allowing or disallowing action. In the early part of the seventeenth century, an English judge, giving the opinion of the Court of King's Bench, stated, that "where words spoken do tend to the infamy, discredit, or disgrace of the party, there the words shall be actionable" (*Small v. Hammond*, 1 Bulshode's Reports, 40). And Chief-Justice Holt, in the beginning of the next century, observed, "That it was not worth while to be learned on the subject; but whenever words *tended to take away a man's reputation*, he would encourage actions for them, because so doing would much contribute to the preservation of the peace" (*Baker v. Pierce*, 6 Mod., 24). These quotations show that then there was no distinction between words written and spoken; and Holt's opinion clearly shows that the judges were in the habit of exercising discretion, and considering themselves the nature of the language used. Their discretion came at length to be exercised according to a fixed rule, and that rule has been held to be now fixed law. It has been applied solely to spoken words, and neither in itself, nor in its application, can it be adduced as an instance of the benefit to be derived from judge-made law. The decision which placed the distinction between libel and slander beyond doubt, was not given till the present century; and we quote a passage from the opinion of the presiding judge, as it shows at once the unreasonableness of the judgment, and that it was given only upon the ground of the practice of the preceding century. Sir James Mansfield said: "For myself, after having heard the case extremely well argued, I

cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. For the plaintiff in error, it has been truly urged, that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander [defamation]¹ as far back as Charles the Second's time, and the difference has been recognised by the courts for at least a century back." After some remarks as to the criminal remedies for defamation, he refers to the arguments used by the introducers of the distinction: "It is curious that they have adverted to the question, whether it tends to produce a breach of the peace; but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of malignity, but for the damage sustained. So it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter: it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law" (*Thorley v. Kerry*, 1812, 4 Taunton, 364). It is remarkable that the distinction thus established, with the view of limiting the right of action for slander, should have been made by the same judges who strained every power of the law to reach everything that parties chose to call a libel, possibly, because thereby they thought to retain power to keep the press in subjection.

Words, then, are divided into two classes: one class actionable without proving; and the other, not actionable except upon proof of special damage from their use. The division is thus stated in Bacon's Abridgment (7th ed., vol. vii., p. 258): "Where the natural consequence of the words is a damage—as, if they import a charge of having been guilty of a crime, or of having a contagious distemper, or if they are prejudicial to a person in an office, or to a person of a profession or trade,—they are in themselves actionable. In other cases, the party who brings an action for words, must show the damage which was received from them." To the first class may be added, "words tending to disinherit." The difficulty of proving special damage is so great, that words falling under the second class are usually not actionable, and in ordinary language are so called.

Where a crime is imputed, to render the words actionable, it must

¹ *Slander* is now generally, and ought always to be used as signifying *spoken* defamation alone; the word for that which is *not spoken* being *libel*.

is a crime for which *corporal* punishment can be inflicted (I. Starkie on Libel, 43). In America, where the English rules have been adopted, the crime imputed must be such a one as, if proved, would "subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment" (Kent's Commentaries, 8th ed., vol. i., p. 620). The ground upon which damages may be awarded is, strictly speaking, the jeopardy which the party slandered runs of punishment—his exposure to criminal liability (I. Starkie, 17). The awarding of damages as *solatium* for wounded feelings is not recognised by the law. The consequences of the ground on which damages are awarded are anomalous. Thus it has been held not actionable to impute a criminal intention, unless an overt act be also imputed; because, as Sir Edward Coke explains, "the purpose or intent of a man without act is not punishable by law" (4 Co. 16 pl. 10). Sometimes the consequence was, that the falseness of the slander, the less actionable it was. It has been held not actionable to say of A that he murdered B, so long as B was in life, "since it appears that no murder can have been committed, nor the plaintiff in any jeopardy" (Snagge v. Gee, 1597, 4 Coke's Rep. 16). It is useless, however, to enter now into a discussion of the minor absurdities to which a recognition of only this one ground of action led, because at present it exists solely as an almost antiquated legal fiction. It may be affirmed now in general, that the imputation of committing any indictable offence, or of being a committer of such an offence without specification of a particular instance, is actionable.

Words imputing the having of certain contagious diseases are actionable, without special damage, on the ground that a person may thereby be excluded unjustly from society. The diseases which it is actionable to impute, are few in number, and apparently arbitrarily selected. The injury to the feelings by having a degrading disease imputed to one, is not recognised. Such words, therefore, are not actionable, unless they impute the having of the disease at the time (*Carslake v. Mapledoram*, 1788, 2 T. R. 473).

The number of words for which action lies, as containing imputations on a person in his office, trade, or profession, is inexhaustible. Anything which a jury may fancy injurious seems actionable. It has been held actionable to say of a barrister that he is a "dunce" (*Peard v. Jones*, 1 Cro. Car., 382), or of a bookseller, that he published an absurd poem (*Tabart v. Tipper*, 1 Camp., N. P. 350). A curious distinction exists as to the right of action possessed by holders of honorary and holders of lucrative offices. The former may not maintain action for words imputing to them stupidity or incapacity, because it is not a man's own fault that he is stupid or incapable. We have found the reason rather unintelligible. Indeed, it is difficult to see why the English law, which is so persistent in regarding nothing but the possibility of pecuniary loss arising from the use of the words, should allow action at all to

the holder of an honorary office. It cannot be said that it is with the view of supporting the dignity of the unpaid magistracy, because insults to the office of judge should either be punished on the spot, or should form matter for public criminal prosecution.

Words "tending to disinherit" hardly fall within the class of defamatory words. It is possible that they may contain nothing in the least derogatory to the character of the plaintiff. Thus, action has been held maintainable by a remainder man against another, for saying that the tenant in tail had issue (*Bliss v. Stafford*, *Ow. 27*). Any heir may bring this action for any words which may be supposed to have a tendency to get him cut off from his inheritance (*I. Starkie*, 145).

The working of the English law, as we have now explained it, is far from satisfactory. Insults of the most aggravated description may be offered, and the party insulted left without reparation. In the most public place in London, a man may be denounced as a forsworn liar, cheat, rogue, swindler, villain, as a common filcher and companion of cut-throats—and, what is worse than this, the reputation of the most honourable woman may be attacked with the vilest of epithets,—and all without redress. And the law is capriciously severe at times. Remedy is allowed both civilly and criminally for what is written, if only one or two persons see it, while the same imputations may with impunity be orally diffused by proclamation in a public meeting. The honour of a woman may be attacked at pleasure; but the law gives redress to any shop-keeper, the "respectability of whose establishment is questioned." The private characters of judges may be traduced almost to any extent; but it would be actionable to insinuate that any of the ornaments of the Bench were stupid. You may say of a barrister that he is a scoundrel, but not that he is a dunce; of a physician, that he is a rascal, but not that he is no scholar. The principles which the English judges have laid down, have not even the advantage of being easily applicable. "There is not, perhaps, so much uncertainty in the law," says a learned American judge, "as when words shall be in themselves actionable." Within the last few months, the Court of Queen's Bench were occupied with the important matter for discussion, whether "blackleg" were actionable or not? So important was the question, that the Court did not feel itself equal to its decision; two learned judges being of opinion that it was, and other two that it was not actionable. They wisely, however, so framed their judgment, that the opinion of a higher tribunal may be taken; and we may hope to be able in a future Number to relieve any anxiety which our readers may feel as to the result of this weighty matter.

The remedy given by the right of proving special damage, in the case of words not in themselves actionable, is, as we have already remarked, of little value. The rule as to this kind of damage, is said by *Starkie* (vol. i., p. 204) to be, "that it must be the mere

natural, and immediate consequence of the wrongful act." Such losses, as the loss of office, or preferment, or of customers, or of an opportunity of being married, are admitted as special damage. In nine cases out of ten, it is impossible to trace any such loss directly to the use of the defamatory words. There has been a disposition to correct the severity of the law requiring proof of special damage, by counting as such even the most trifling loss. Starkie says, that even the loss of a dinner would entitle a party to an action. This is doubtful. There is one case in which the loss of hospitality, on which the plaintiff had lived to a great extent, was held to be a sufficient special damage (*Moore v. Meagher*, 1807, 1 Taunton, 39); and there are cases in America (*Beach v. Rannay*, 2 Hill, 309), where similar small losses were admitted. But the American cases, at least, all went on the principle that pecuniary loss had been sustained. In a case where trifling loss gave the right of action, it is very doubtful whether a verdict would stand, which gave damages in proportion to the injury done to the plaintiff's character, but possibly far beyond the amount of the special damage proved.

It has been more than once proposed to abolish summarily all the nice distinctions which the English judges have introduced into their law of defamation. In 1816, Lord Brougham brought a bill into the House of Commons, which he had carefully prepared along with the late Chief-Justice Tindal. In it, he proposed to make actionable all words, whether spoken or written, if they were "in any way injurious to the character and reputation of the plaintiff." In some of the United States, the English law has been modified by special provisions. Thus, in Virginia, all words "which, from their usual construction and common acceptance, are construed as insults, and tend to violence and breach of the peace," and, in Indiana, charging by words a female with any breach of chastity, are made actionable (*Kent's Commentaries*, 8th edition, vol. 1., p. 620). Lord Brougham's measure was lost, because it contained clauses affecting State prosecutions for libel, which had the effect of raising a party question. Indeed, there is no hope for the amendment of the law of defamation, so long as it continues to be involved with the question of what are libels against the State. The latter have as little in common with defamation, as treason has with petty theft. They depend upon important matters of public policy, and important questions as to the liberty of the press, which have little application in considering the protection of private character. The result of treating one of the so-called seditious or blasphemous publications as a libel upon the character of the State, has as yet been nothing more than intolerable confusion in the law, and unnecessary bewilderment to jurymen. Had Lord Brougham's bill been carried, it would have brought the law of England as to actionable words more into conformity with that of Scotland, as well as France, Germany, and Rome. The examination of what our practice is on this subject, must in the meantime be reserved.

Correspondence.

WHEN IS A BILL DUE?

(To the Editor of the Journal of Jurisprudence.)

THE present rule for computing the maturity of bills seems open to objection in one particular, and though the question is not of very vital importance, especially when the practice is so inveterately the other way, perhaps you will permit me to explain how I think the matter should stand in point of principle.

The difficulty arises with those bills only, the currency of which is expressed in months, and not with such as have days or weeks to run. The usual mode of ascertaining the maturity of a bill having so many months to run, is to compute from a given day of the month when dated, to the corresponding day of the month when due; as, for example, from the 4th of May to the 4th of June is a month. And this seems correct enough; for, if the operation is carried on throughout the calendar, the year is exhausted and divided exactly in proportion to the duration of the different months of which it is made up. But this mode of computation, although correct enough, when a bill is dated during the currency of a month, is inapplicable when a bill is dated the last day of a month, if that day do not correspond to the day when due. According to the words of a bill, the term begins to run *after* its date. It is settled law, that the date of a bill forms no part of its currency, and the time which it has to run is computed exclusive of its date. It is settled law also, that *months* mean calendar, not lunar months. Now, suppose a bill dated 30th April having three months to run, it is due, when days of grace are taken into account, on the 31st July and 3d August, according to the legal rule; but it appears that it is common for bankers and merchants to consider such a bill due on 30th July and 2d August. This practice evidently arises from applying the same mode of calculation to a bill which is dated the last day of a month, as when it is dated during the currency of a month. This is all very well, if the day when due corresponds to the date when drawn; as, for example, when a bill having two months to run is dated the 30th April, the month of June ending on the 30th as well as the month of April, such a bill is naturally and legally due on the 30th June and 3d July, and can be due on no other day. But the case is different if the last day of the month when a bill is drawn is on the 30th, and the last day of the month when it is due falls on the 31st. In order to prove this, suppose we take three bills, each dated in immediate succession to the other, thus:—

A bill dated 29th April, at three months' date, is due 29th July and 1st August.

A bill, dated 1st May, at three months, is due 4th August.

A bill dated 30th April, at three months, is due therefore on the 3d August. For, if it is due on the 2d, a day in the calendar is unaccounted for, and the time therefore between the 30th April and the 2d of August is not three months.

Each of these three bills has the same period to run; and as there is no interval of time between their dates when drawn, there should be no interval of time between their dates when due. Each calendar month has not the same duration, and therefore each of the three bills in the example may not have the same number of days to run; but this only proves that the mode of computation which applies to a bill dated during the currency of a month, does not always apply to a bill dated the last day of a month; and if calendar months are understood, the whole of each calendar month must be exhausted, otherwise the whole of the year is not accounted for.

The difficulty I have suggested, and think explained, may not be of frequent occurrence, since bills are seldom dated the last day of a month. Neither, on this account, may it be of much practical moment, since it is settled law that a

It may be protested on any of the days of grace, although not on the last day when due, preceding the first day of grace; and if merchants make such a bill one dated the 30th April, having three months to run, due on the 2d in place of the 3d August, they prevent the risk of being too late in protesting; and, if they err, they thus do so on the safe side. But should such a bill be presented for payment on the 3d in place of the 2d, or if a bill at one month were dated the 28th February and protested on the 29th or 31st March, in place of, as we believe it ought to be, on the 1st or 3d April, the question becomes important; and here we have an illustration in the case of bills themselves of the principle I have laid down,—that a written document proves itself, and practice may explain, but never can alter the meaning of a contract. Days of grace are allowed by usage, but form no part of the terms of a bill, and they are accordingly excluded in the strict interpretation of it, when protest is permitted to be taken not on the last, but on the first day of grace.

There is only one case on record where the difficulty was started, but it is solved, viz., the case of *Jarron v. Smith*, 17th June 1803. In that case the words considered the point to be one of considerable difficulty, although they were reported to have held, that the 2d, and not the 3d, was the practice of merchants. Mr Thomson, also, in his work on the Law of Bills, considers the rule to be, that such a bill is due on the 3d, and points to the authorities which he refers to as establishing the rule. Moreover, the practice itself is inconsistent, for months are reckoned calendar months in some cases, and in other cases not. When a bill is dated 31st January, having one month to run, it is due, according to the practice of merchants, on the 28th February and 3d March. A bill dated 31st March, at one month, is due, according to the same practice, 30th April and 3d May. In both these instances the months are reckoned calendar months, and the rule of computing from a given day in one month, to a corresponding day in another, is not followed. When, on the other hand, according to the practice referred to, a bill is dated 28th February, at one month, it is due 28th and 31st March; or when one is dated 30th April, at one month, it is due 30th May and 2d June. Now, why reckon by calendar months in the one case and not in the other, and why not adopt the same modes of computation in both cases if calendar months are not understood?—I am, etc.,

A GLASGOW BANKER.

English Cases.

WILL—Presumption of Death.—B arrived in Albany, New York, in April 1850, and was never heard of afterwards, though inquiries were made. His wife died in England, in February 1857, leaving a will dated in January of that year. Probate was granted as of the will of a widow.—(*Re How*, 31 L. T. Rep. 26.)

SALE—Conditional Contract.—B agreed to sell, and C to buy, fifty cases of tallow, at 48s. 6d. per cwt., to be paid for within fourteen days after finishing the loading thereof, to be delivered on safe arrival in the port of London of the ship called the "D," then on her passage from Calcutta to London. This was held to be a contract to deliver the tallow, conditional only on the safe arrival of the ship, and that it was no answer to the demand that the ship arrived without the tallow on board, without default or negligence of C.—(*Hale v. Rawson*, 31 L. T. Rep. 59.) In delivering judgment, Williams, J. said—The principles of law applicable to this case are undisputed. Where there is an agreement to deliver goods to a vendor on a certain condition, and the condition, without any default on the part of the vendor, never comes to pass, it is

plain that he will not be liable for non-delivery. But where the agreement is absolute or conditional on an event which happens, the vendor will be liable for the breach, although he could not help the non-performance, for it is his own heedlessness if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. The question is, whether the agreement to deliver the tallow stated in the declaration in this case is conditional on the arrival of the ship merely, or her arrival with the goods on board. The contract alleged is, to sell the tallow at a certain price, to be paid for fourteen days after finishing the landing, to be delivered on the safe arrival of the ship. The plaintiff contends that this was an absolute contract to sell and deliver the tallow, provided the ship arrives; the defendant insists that, as the price was not to be paid till a certain time after the landing, there is also an implied condition that the tallow shall arrive in the ship. Now, if there was no such stipulation as to the time of payment, the contract would merely be to deliver the tallow out of the ship if she arrived, whether it should be possible or impossible to perform the contract. How then can it make any difference that the plaintiff undertakes, in case the contract is performed by the defendants delivering the tallow out of the ship, to pay for it within a certain time after it is landed? We think that the stipulation introduces no additional condition, and that, as the ship has arrived, there was nothing to absolve the defendant from performing his contract, and consequently that he is liable for the breach of it.—*Judgment for the plaintiffs.*

PROMISSORY NOTE—Public Company.—The Court of Appeal affirmed the decision of the court below, that a promissory note, signed by three directors of a limited company, and countersigned by the secretary, was binding on the company, and that the directors were not personally liable.—(*Lindus v. Melrose*, 31 L. T. Rep. 38.)

CARRIERS—Railway—Refusal to Pay Carriage.—B delivered to the C railway in London a packed parcel, directed to his agent at Plymouth. On arrival, it was duly tendered, but the charge being disputed, it was taken away and sent back to London. Soon afterwards the amount was tendered at the office, and the parcel demanded, but it was then at Paddington. The jury found that the parcel had been sent back unreasonably soon, and that the tender was made within a reasonable time. The defendants were held to have been guilty of a breach of duty, and to be liable.—(*Crouch v. The Great Western Railway Company*, 31 L. T. Rep. 38.) Crouder, J. dissented; Willes, J., agreeing with the rest of the court, observed—"When the parcel was refused at the end of the line, they were entitled to retain it in respect of their lien. They might, if they chose, have delivered the parcel, trusting to their action for the recovery of the proper sum for the carriage. They did not think proper to do so, but retained it; and, retaining it, it appears to me they were not entitled to dispose of it as they thought proper themselves. They could not have sent it to any foreign port; they could not have sent it to any part of the kingdom where it would be expensive and troublesome for the plaintiff to go to receive it. I think that those are plain propositions. If so, there must be in effect some duty imposed upon them by law, and that duty is to take reasonable care of a parcel, and to deal with it, in respect of time and place, in a reasonable manner."

SEPARATION—Custody of Children—Invalidity of Agreement.—Where an agreement for separation contained provisions as to the custody of the children, by which two would remain in the wife's custody to the exclusion of the husband, and in case one of the children residing with the wife died, the husband should resign to her one of them residing with him, it was held by Chelmsford, C. and the L. J., that these provisions were against public policy, and as they occurred in an agreement, the agreement was altogether invalid. On the other hand, where a deed has been executed, the court will enforce such parts of it as are valid, and reject the rest; but agreements for a separa-

tion between husband and wife are tolerated rather than encouraged by a court of equity.—(*Vansittart v. Vansittart*, 31 L. T. Rep. 4.)

PRINCIPAL AND SURETY.—A bond was given by B as surety to secure the payment of any balance on advances made by a banker to C, not exceeding L.1000, together with interest thereon, and B had consented to do so on receiving from the banker a memorandum that the advance to the principal was to be limited to L.950, and that the surety was to be informed if the amount, with interest, should reach L.1000, and not be reduced within one month. It was held that the only effect of this memorandum was to limit the liability of the surety in point of amount, and that a violation by the banker of the stipulations contained in it afforded no defence, either at law or on equitable grounds, to an action against the surety on the bond.—(*Gordon v. Rae*, 31 L. T. Rep. 55.)

THE APPORTIONMENT ACT.—In a case before Kindersley, V.C., these questions occurred:—(1.) Whether dividends declared on certain shares in the P. and O. Steam-packet Company, standing in the names of the trustees of the settlement made on the marriage of Mr and Mrs Hartley, were apportionable under the 2d section of the 4 and 5 Will. IV., c. 22; secondly, whether an additional payment to the shareholders, declared in respect of the profit made by the company on the sale of certain new shares of the company, was apportionable under the same section of that Act; and thirdly, if such dividends and payments respectively, or either of them, were apportionable, whether such apportionment was to be made from the 30th September 1856, or from 26th December following, that day being the one on which the preceding dividends were made payable to Mr Hartley. His Honour, after stating the facts, said—Can it be successfully contended that the dividends or the shares in this company are not dividends or payments within the terms of the Act? The question then is, if they are dividends or payments within the Act, are they payments made payable or coming due at fixed periods? It appears to me that they are so, and therefore apportionable. On the second question, I think that the additional payment in respect of the profit arising from the sale of the new shares is not apportionable. It is not a dividend; the company themselves do not treat it as such. There is nothing in the nature of it to bring it within the other words of the Act, and therefore it cannot be apportioned. Upon the third question, as to the time from which the apportionment was to be made, the Act says, with regard to the apportionment of any interest under it, that it shall be made according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, as the case may be, including the day of the death of such person, or the determination of his or her interest. Now the last period of payment of dividend to Mr Hartley was the 20th December 1856. The apportionment, therefore, must be made from that day to the day of his death inclusive.—(*Garner v. Briggs*, 31 L. T. Rep. 68.)

TRUSTEES—Public Dock—Liabilities.—The plaintiff, as the owner of a cargo of guano on board a ship called the "Sierra Nevada," sought to recover damages from the trustees of the Liverpool Docks, for an injury done to the cargo, by reason of the ship having struck a bank of mud lying in and about the entrance of the dock, as she was endeavouring to enter it. This complaint was put forward on two grounds. First, it was alleged that the trustees, as the proprietors of the dock, receiving from vessels certain tolls, which under their Acts they were bound to apply in and about the maintaining, cleansing, and supporting the dock, so as to be in a state fit for vessels entering and navigating the same, had failed to do so. Secondly, it complained against the defendants that they, knowing the state of the dock, negligently permitted the same to continue, and allowed vessels to use it. The defendants having demurred to this declaration, the question, whether it disclosed any good cause of action, was argued in the Court of Ex., and decided in the negative. On appeal to the Court of Ex. C., the counsel for the

defendants contended that the defendants, being a corporation created by statute, and deriving no emolument from or remuneration for the performance of their statutory duties, and having a discretion as to the application of the funds received by them, could not be made liable in an action at law for not choosing to exercise their discretion at any particular time, by spending the funds in removing the accumulation of mud. The Court of Ex. C. reversed, and gave judgment for the plaintiffs. Coleridge, J.—“It may be doubted, we think, whether the coupling this averment with the allegation of the knowledge of the trustees that the entrance to the dock was dangerous, a state of facts is not shown under which they had a positive duty to perform, and not merely a discretion to exercise as to the removing of the danger. But, at all events, we think that if they had a discretion, under the circumstances, to let the danger continue, they might, as soon as they knew of it, have closed the dock to the public, and that they had no right, with the knowledge of its dangerous condition, to keep it open, and to invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, on payment of the tolls to them, might enter and navigate the dock.”—(*Gibbs v. The Trustees of the Liverpool Docks*, 31 L. T. Rep. 22.)

COPYRIGHT—Dictionaries.—In *Spiers v. Brown*, 31 L. T. Rep. 16, Wood, V. C., had occasion to consider how far the author of a French Dictionary was at liberty to “use” another dictionary in its preparation, without infringing copyright. He said—All cases of copyright are very simple when a work of an entirely original character is concerned, being a work of imagination or invention on the part of the author, or original in respect of its being a work treating of a subject common to mankind, such as history, or other branches of knowledge, varying much in their mode of treatment, and in which the hand of the artist can be readily discerned. But the difficulty that arises in this class of cases is, that they only relate to a subject common to all mankind, and that the mode of expression and language is necessarily so common, that two persons may, to a very great extent, express themselves in identical terms in conveying the instruction or information to society which they are anxious to communicate. The most obvious case is that of figures, such as a table of logarithms—where the calculations are so nicely performed, that the result, and the expression of the result, must be identical. Neither is it very easy to vary the order. The same may be said of Directories, Calendars, Court Guides, and works of that description. Those are cases in which the only mode of arriving at the amount of labour bestowed is by the common test resorted to, of discovering the copy of errors and misprints, indicating a servile copying. Copyright is considered for the highest purposes of society in every country as necessary to be secured to those who contribute to the civilisation, refinement, or instruction of mankind, and is extended in this country, if not elsewhere, to every description of work, however humble it may be, even to the mere collection of the abodes of persons, and to streets and places; and labour having been employed upon subjects even of that class, no one has a right to avail himself of it. As to Dictionaries, the matter stands in a somewhat different position. There may be a certain degree of skill exhibited as to order and arrangement, and there may be a good deal of ingenuity exhibited (as by Dr Spiers) in the selection of phrases and illustrations, which are the best exponents of the sense in which the word is to be used. There may also be great labour in the logical deduction and arrangement of the word in its different senses, when the sense of the word departs from its primary signification. Where use was admitted, the only question was, whether it was a fair use; it must not be a republication, with mere colourable alterations;—but there was no breach of copyright when there was a legitimate use of the publication in the fair exercise of a mental operation deserving the character of an original work.

MERCHANT SHIPPING.—It was decided in *Cope v. Doherty*, 31 L. T. Rep. 173.

that sec. 576 of the Merchant Shipping Act applies only to British ships, except where foreign ships are expressly mentioned.

AUCTIONS.—Conditions of Sale.—A condition of sale provided that, upon failure to comply with the conditions, "the deposit shall be actually forfeited to the vendor, who shall be at liberty to resell; and any deficiency upon such resale, together with all expenses attending the same, shall be made good by such defaulter." The property was put up and sold to B. for L.120, who did not pay the deposit, and ultimately refused to complete; on which the property was resold for L.105. Upon this the question was, whether B. was liable for the amount of deposit which he ought to have paid, or only for the difference between the price at which he bought and that at which it was resold. He was held to be liable only for the latter, and for the expenses attending such resale.—(*Ockenden v. Henley*, 31 L. T. Rep. 179.)

LAW OF PATENTS.—An important and interesting case is *Newall v. Elliott*, 31 L. T. Rep. 180, in which the following principles were laid down:—First, that the effect of provisional specification is only to describe generally the nature of the invention, and not to enter into minute details as to the manner in which it is to be carried out. Secondly, that a necessary disclosure of the invention to others, if only made in the course of mere experiments, is no publication, although the same disclosure made in the course of profitable use of an invention previously ascertained to be useful, would be a publication.

RAILWAY—Passengers' Luggage.—Goods were delivered at a station on the line, and by one of the company's servants. The box containing them was delivered at the hotel where the owner was staying, but the goods were gone, and the lock appeared to have been picked. It was contended that there was evidence to go to the jury of a felony committed by a servant of the company. But the Court held that this was not sufficient. It is not enough to show facts consistent with a felony having been committed by a servant of the company, but the evidence must be inconsistent with a felony having been committed by somebody else.—(*Metcalf v. The London, etc., Railway Company*, 31 L. T. Rep. 165.) In another action by the same plaintiff jointly with his brother for the same loss, the same facts were proved, with the addition, that property lost, belonging to them jointly, had been put into the box, and the question was, whether there was a joint contract by the two plaintiffs and the company. The Court held it to be so.—(31 L. T. Rep. 166.)

AGENT AND CLIENT—Authority to bring an Action.—In a case of *Re Atkinson*, 31 L. T. Rep. 134, an application had been made to compel a solicitor to discontinue an action, on the ground that he had commenced it without authority from the plaintiff. The plaintiff in the action swore positively that he gave no authority and knew nothing about it. The attorney, on the other hand, produced affidavits to show that instructions to commence the action had been given to his clerk by the plaintiff. The Court of C. P. held, that as they could not make the rule absolute without convicting the attorney of perjury, it must be discharged, though, under the circumstances of the case, without costs.

PUBLIC COMPANY—Liability of Promoters.—A number of persons proposing to form a railway company signed the subscribers' and parliamentary contracts in the usual form, giving the usual authorities to the committee and indemnifying them. Afterwards this proposed company was amalgamated with others. Previously to this, the committee had employed A. and Co. as the solicitors to the proposed company; they applied to the amalgamated company for their costs, which was refused. The original company having been ordered to be wound up, it was held that, though it never came to be a company, it was an association liable, as such, for its debts.—(*Re The Warwick and Worcester Railway Company*, 31 L. T. Rep. 145.)

BILL—Notice of Dishonour.—The holder of a bill called at defendant's office on the 13th January, the day after the bill became due, and asked to see defendant, but was told he was engaged. He then wrote on a piece of paper as

follows: "Boswell's acceptance to Mr Joel for L.500, due 12th January, is unpaid; payment to Roberts and Co. is requested before four o'clock." This paper he gave to the clerk, who took it away, and shortly returned and said it should be attended to. The Court of Ex. held the notice of dishonour was sufficient.—(Paul v. Joel, 31 L. T. Rep. 185.)

FORGERY—Signature of Agent—Fraudulent Insertion of Larger Sum than paid.—In Reg. v. Griffiths, 31 L. T. Rep. 121, the facts were these:—B. was employed by a railway company to collect and deliver parcels, for which he was paid in respect of each parcel. The station-master (the prisoner), whose duty it was to pay B., falsely told him that the company had determined to discontinue paying for the delivery of the parcels. In his accounts, however, with the company, he continued to charge them with payments said to be made to B. for the delivery of parcels, and as vouchers for such payments, he wrote in the printed forms supplied by the company, on the side appropriated to the collection of parcels, the words "Received for B.," which a servant to B., to whom he paid the money due for collecting the parcels, signed. Afterwards the station-master secretly put a receipt stamp under the signature, and wrote across it the amount both for collecting and delivering the parcels. Upon a case reserved, this was held to be a forgery, and the conviction was affirmed.

LIFE ASSURANCE—Payment of Premium.—In a life assurance policy, the heading expressed the premium to be an annual one, payable quarterly. There was a recital of the payment of the premium for the assurance until the next quarter day, and a declaration that if the life should die before the end of the first year, or should live beyond such period, and the *annual amount* of premium should, on or before that period, or on or before every succeeding year during the life, be paid, the funds should be liable, etc. Then there was a proviso that if the life should die before the whole of the quarterly payments should have become payable for the year in which he should so die, it should be lawful for the directors to deduct from the amount of the policy so much as would be sufficient to satisfy the whole of the premiums for such year. The life died within the first year, and after the day for the payment of the third quarterly instalment, which had not been paid. It was objected that this was not an annual premium, which would be due from the person who effected the policy, but a quarterly premium, which he could drop at the end of each quarter if he pleased. No doubt, although obscurely worded, this was the intent of the policy, and if the assured had dropped his payment at the end of the first quarter, he would have resisted an attempt by the company to make him pay the remaining three quarters; and so the Q. B. held.—(Sheridan v. The Phoenix Life Assurance Company, 31 L. T. Rep. 113.)

APPEAL IN THE HOUSE OF LORDS.

MORGAN v. MORRIS, ETC.

Process—Jury Trial—Amendment of Verdict.

(Court of Session—11th March 1856—18 D. 797.)

This case went to trial on these issues:—"1. Whether the pursuer Alex Morgan is nearest and lawful heir of John Morgan, sometime residing at Coates Crescent, Edinburgh, deceased? 2. Whether the pursuer James Morgan is, along with the said Alex. Morgan, next of kin of the said John Morgan, deceased?" The other claimants (the respondents) were made defenders of the issue, and the Morgans were made pursuers. The trial took place before the late Lord Justice-Clerk Hope, in August 1853, and lasted four days. The jury returned a verdict, which was thus entered upon the issue:—"Find the case for the pursuers is not proven." Upon the 26th July 1855 the House of Lords declared that the verdict delivered by the jury was uncertain, and could not be applied, "inasmuch as it does not show whether the

pursuers failed in proving both the issues or only one of them." And the case was remitted back to the Court, "to do therein as shall be just and consistent with this declaration and judgment." The Court, instead of directing a new trial, held that it was competent for them, on a consideration of the judge's notes of the evidence, and a memorandum of the way in which he left the case to the jury, to enter a verdict in the form and manner intended by the jury. They accordingly pronounced this judgment:—"Finds that the case for the pursuers is not proven, and therefore that upon the first issue they find it is not proven that the pursuer Alexander Morgan is nearest lawful heir of John Morgan; and upon the second issue, that they find it is not proven that the pursuer James Morgan is, along with Alexander Morgan, next of kin of the said John Morgan." The pursuers now appealed from that interlocutor.

The LORD CHANCELLOR said, he was of opinion that the Court of Session had no power to amend the verdict in the way they had done. In England there was no inherent power in the courts or the judge to amend the verdict, though, of course, all courts must necessarily have a power to correct clerical errors. The power of amendment had been given to the courts in England by various statutes, some of ancient date. It did not appear that any statute in Scotland gave any such power, and therefore the authority of the Court of Session could not extend to amend a verdict which had been once entered, so as to change it in substance. In one or two cases the Court had properly enough altered a verdict; as, for instance, where the jury had included in their verdict matters which were not competent for them to deal with—in that case the Court said it could be corrected so as to avoid the expense of a new trial. But he could find no case in which the Court of Session had ever before taken upon itself to amend a verdict to the same extent which had been done here. *Marianski's case* was merely a case where the officer of the Court had misapprehended the verdict, and entered it wrongly (12 D. 1286, 1 M.Q. 212; 15 D. 268, 1 M.Q. 770). It was not a case, when properly examined, which gave any authority for amending an erroneous verdict, but merely for amending an erroneous entry of the true verdict. Now, in this case the verdict was uncertain in its terms. It meant any one of many things. A judge in England would have no power to enter such a verdict at all; the proper course would be, if such a verdict were offered, for the judge to refuse to receive it, and to ask the jury to reconsider the matter, and say distinctly what specific facts they found. If such a verdict had by mistake or inadvertency been received by the clerk or officer, the only remedy which the Court could give would be to direct a new trial. This ought also to have been the course taken by the Court of Session. Mr Commissioner Adams, in his treatise on Jury Trial, lays it down expressly, that whenever a verdict is ambiguous, imperfect, or inconsistent, there must be a new trial. Here, therefore, it was impossible for their Lordships to sustain such an amendment as had been made of the present verdict. But even if the Court of Session had the power to amend ambiguous verdicts, how was that power exercised here? The Court had gone far indeed beyond its proper limits, and had resorted to materials which must be considered quite unfit to warrant their proceedings. They referred to the Lord Justice-Clerk's notes of the trial, and the notes of his proposed charge to the jury made the night before, and to his recollection, in order to ascertain the true meaning of the jury according to the actual substance of the questions at issue between the parties, so as to enter the verdict in the form and manner adapted to the truth and reality of the case." And then the Lord Justice-Clerk, on examining his notes and recollection, says, "I had no doubt whatever as to the meaning of the verdict, viz., that the jury found that the pursuers had failed to prove either issue." Now, there was no doubt as to what the jury found in terms, but the Lord Justice-Clerk gave us an inference of his own, as if the jury themselves had drawn it. The Court of Session take the verdict of the jury, and then interpret it in their

own sense, drawing from it a conclusion which is not warranted by the premises. The Court assume that only one hypothesis could be adopted as to what ground the jury proceeded on, whereas there were several grounds. It was also most important to bear in mind that the sole question was involved in the issues, and in the issues alone, and those issues must alone be looked to, and you could not travel out of them to the record. That point was strongly put by Lord Brougham in a case of *Leyes, Masson, and Co.* (decided several years ago), who clearly laid it down that at the trial of an issue before a jury, you were as much precluded from going out of the issue, in order to construe it, as you would be precluded from going out of an Act of Parliament, and looking back to what was said by the Legislature when it was a bill, in order to construe its meaning. The issues, therefore, in the present case allowed evidence to be given of the existence of other brothers of the deceased besides those alluded to in the condescendence, and hence the ambiguity of the verdict was apparent. The amendment made by the Court of Session of this verdict was thus quite unwarranted. The only question, therefore, that remained was what is the course which the House will now order to be taken? It would now obviously be vain to send this cause back to the Court of Session to have the verdict cured; it is a bad verdict, and contains an inherent vice. The utmost that can be done is to direct that a new trial shall take place. There was, unfortunately, no other mode of extricating the parties from the position in which they had become involved. The interlocutor must therefore be reversed, and the cause remitted, with a declaration that there must be a new trial.

LORD BROUGHAM said he entirely agreed with his noble and learned friend; and, however reluctantly he might assent, there was no other course open to the House, and a new trial was inevitable.

LORD CRANWORTH said, he had little to add to what had been said by his noble and learned friend on the woolsack. When the case was last before the House, he thought that, though the Court of Session no doubt had power to correct a clerical error, yet this was not a verdict that could be cured in the way adopted, for there was no clerical error. If it was supposed that the House had on that occasion given an opinion that the verdict could be altered, it was quite a misunderstanding of what was said. It was, however, doing no harm to remit the cause to the Court of Session to do what was proper. Of course, if the judge's notes had contained a record of several distinct questions, with answers, showing beyond doubt what the jury found, and there had been some mistake of the clerk of the Court in entering the verdict too generally, that would have been a competent case for an attempt of that kind; for it would have been merely a misinterpretation by the officer of a right verdict. But the Court of Session had started from the wrong hypothesis. They first assumed that the jury could only mean one thing; and then, as they thought, they entered the logical effect of what the jury meant. That was doing what the Court had not the power to do. It was making it the verdict of the Court and not of the jury. It was an attempt, no doubt, on the part of the Court to save expense, and, so far, was laudable enough; but to do such a thing was altogether *ultra vires*. Even if the Court had not acted *ultra vires*, they had not made the amended verdict one whit better than it was before. It is still equally open to ambiguity. The Court has merely appended a logical corollary to the verdict, but the logic is not correct, for the conclusion drawn is not warranted by the premises. The old vice of the verdict still remains. It is a case on which he had no doubt at all that the verdict was incurable. The only thing the House could do was to order a new trial; but he confessed, though this was the justice of the case, he had still some hope that a ray of common sense would visit the parties, and they might reflect whether, after the oyster had so effectually disappeared, it was worth while to quarrel as to which of the shells would fall to their portion.

THE LORD CHANCELLOR.—We will say nothing about costs.
Reversed.

THE

JOURNAL OF JURISPRUDENCE.

ENGLISH AND SCOTCH LAND REGISTERS.

If we wanted an illustration to prove that laws and institutions, however absurd and theoretically impracticable, may be moulded into order and consistency under the pressure of necessity, we could refer without hesitation to the English system of Land Rights. Not that we have any intention at present of proving our proposition by an excursion—in which few of our readers would be likely to follow us—into the profundities of this most recondite department of legal lore. Few English conveyancers are themselves acquainted with half the varieties of tenure that have sprung up, as were sporadically, in different corners of that kingdom; and we should as soon think of investigating the natural history of the *Struthionidunculæ*, or any other of the dragons of science, as of treating our readers to a musty disquisition on these embalmed and wind-dried remains of English feudalism. We shall only say of the English method of examining and pronouncing upon the validity of progress of titles, that it must appear to the Scotch conveyancer to lead to a very lame and impotent conclusion as regards the safety of purchasers. Attempts, however, have recently been made to place titles to land, or “assurances” (as they are termed in English law), upon a more rational footing, on the basis of the Scotch system of registration; and it may not be uninteresting to offer a short explanation of the methods by which it is proposed to carry out this important reform.

It is a somewhat startling fact, indeed, that the purchaser of an English estate, when he has completed what is called a good title to the property, has really nothing better to rely upon than the honour of the vendor's solicitor. It is true, he may demand and obtain from the vendor an abstract or short epitome of all the title-deeds that have been executed within the prescriptive period of sixty years; and he may take a legal opinion on the import of those deeds. But the

estate may have been all conveyed away, burdened with latent equities, or mortgaged up to the last acre, by deeds that have been intentionally kept out of the abstract, and of which the seller's solicitor himself may possibly have been kept in ignorance. Some degree of security, no doubt, is provided by the law of notice, which obliges all parties having latent claims against the estate to disclose them to an intending purchaser, should they happen to be aware that the property is in the market. But if the sale has been carried through *privately*, it is considered that the purchaser must suffer the consequence of his imprudence, though *that* should amount to nothing less than the total loss of his investment.

To remedy this unsatisfactory state of things, various measures have been introduced into Parliament of late years, having for their object the establishment of a general register of assurances. A Royal Commission was appointed last year, charged with the investigation of the whole subject, and they have brought together, in their Report, recently published, a great mass of statistical information, and a variety of ingenious speculations as to the *possibility* of establishing such a register. It is certainly not very creditable to the general information of the members of this Commission, which includes some of the highest judicial and legal names in England, that they seem not to have been aware of the fact that the object at which they were in search—an efficient public register of title-deeds—was to be found in Scotland; for we will not suppose that it was national prejudice that determined the Commission to ignore the existence of our Register of Sasines. One thing, meanwhile, is apparent from the line of examination chosen. A majority of the Commission had, from the commencement of the inquiry, made up their minds against the principle of a complete register of deeds—whether wisely or not we shall afterwards see; and they might be unwilling to look too closely into the working of our system, apparently adverse as it was to the foregone conclusions of these members. To us it would appear, at first sight, as if nothing could be easier and more simple than to make provision for the registration of deeds of transfer or incumbrances, as well as for an examination of the registers on the application of parties who were interested. It must be admitted, however, that there are serious obstacles to the execution of such a plan, arising partly from the endless variety of rights to land under the English law, partly from the assumed hardship of subjecting purchasers to the expense of a compulsory registration, and still more from the difficulty of classifying, identifying, and tracing through the volumes of the register the endless and ever-changing subdivisions of property in the more populous counties.

The expense of completing titles to land in England and Ireland, is already sufficiently burdensome. How greatly the costliness and insecurity of titles has tended to impede the free disposal of land, especially in small lots, is well illustrated by an anecdote that was related by a member of Parliament at one of the discussions on the

Irish Transfer of Lands Act. A proprietor had been asked to sell an acre of land belonging to his estate for building purposes; and, not feeling at liberty to disoblige the applicant, he offered to make him a present of the site rather than dispose of it by sale. In fact, the expense of providing the purchaser with a clear title, in the event of a sale, would have been so much greater than any sum the seller could reasonably ask for the ground, that he would have been a loser by the bargain. Now, the expense of recording conveyances for the future, and of obtaining and examining searches of incumbrances, would always form a material addition to the usual bill of costs; and, after all, the security of title which is the one advantage attainable under any system of registration, would not be obtained until after the expiration of *sixty* years; because any search that might be made prior to the year 1918 would obviously include a period anterior to the commencement of the registry, and liable, therefore, to all the dangers which a register is calculated to obviate. In order that registration might at once be made to afford the desired security, it has been proposed to extend the provisions of the Transfer of Lands Act to England,—in fact, to institute a permanent commission for the public investigation and adjudication of titles. All who chose to take advantage of the register and, at the same time, to clear away the dead weight of cancelled mortgages and defunct titles, which encumbered their charter-chests, would be entitled to apply to this Commission for a new Parliamentary title. After the requisite intimation, by notice and advertisement, of the proceedings in dependence, the applicant's title would be judicially examined, and on being found correct, a *declaratory* title would be granted, superseding the existing progress, and rendering subsequent investigation unnecessary. Such a declaratory title, once recorded, would become the foundation of a new progress, against which no prior claim could be allowed to militate, nor any subsequent claims, except those that were discoverable from the register.

In considering, next, *what* deeds ought to be registered, we are much embarrassed by the absurdities of the antiquated and verbose formulas still in use by English conveyancers. English solicitors are remunerated according to the number of skins covered by the conveyance; and deeds of transfer are complicated with family provisions and long declarations of trust, which would only encumber the register, and increase the troubles of the searcher. Then there are conveyances of the equitable or beneficial right under a trust, which are effectual there to carry the substantial interest in the estate, leaving only a nominal ownership in the trustee, of which he may afterwards be compelled to divest himself. The profession in England would seem to be much divided on the question, whether such conveyances of the "equitable right" should be admitted to the benefit of registration. The Royal Commissioners have come to the conclusion, that they ought not; and suggest that beneficiaries might be enabled to protect themselves against the risk of a fraudu-

lent sale on the part of the trustee by means of a system of "caveats" which we shall afterwards explain. In Scotland, we may remark, no difficulty has ever been experienced in knowing what deeds to register, in consequence of real or feudal rights being alone transmissible by sasine; and even under the provisions of the Titles to Land Act, it will still be necessary to record a separate notarial instrument, when the deed of conveyance includes other matters which are not proper for registration. If the principle of a register of "assurances" is sanctioned, we suspect it would be found indispensable to record either the entire deed, or a certified excerpt from it, prepared by the solicitor. No purchaser would be safe in trusting to the record for the *contents* of the deed, if any form of abridgment were allowed.

The Royal Commissioners, however, have recommended a method of abridged entry which, in its leading features, bears a general resemblance to the form of the Minute-Book of the Register of Sasines. Of the two characters in which we may consider the Scottish registers, as presenting a key to the discovery of all deeds relating to property, or as a permanent record of their contents—the first of these is unquestionably the more important; and if the object contemplated by English law reformers in establishing a land register, be simply to ascertain what number of deeds affecting the lands, have been executed within a given time, and by whom—the Commissioners' scheme of an abridged register, specifying merely the fact of ownership, seems sufficient for the purpose.

There are some peculiarities, however, in this scheme, to which we wish to advert. Setting aside the idea of a "Register of Assurances" as requiring a vast, and perhaps unmanageable machinery, the Commissioners propose to substitute what they call a "Register of Title" which is, in reality, a register of *ownership*, similar in form to the register kept at the Bank of England of the holders of stock. Briefly, then, the landowner in possession will be required to furnish a description of the subjects, to be stated and set forth according to some fixed style. Along with the description, he will be required to lodge a private plan of the property; and reference will also be made to public maps kept in the registry, being either those of the Ordnance Survey or, if these have not been completed, then the maps of the Tithe Commutation Commissioners. Such a description, combining the separate advantages of written and graphical representation, will be taken as the basis for a registered title. In subsequent entries nothing more will be expressed than the name and designation of the transferee, with a reference to the deed of conveyance,—unless an amended description has become necessary. A certificate of registry will, of course, be granted, and will be received as *prima facie* or presumptive evidence of the ownership.

The reader will be ready to ask,—in what manner is provision to be made, under such a system, for the registration of those various partial and qualified interests in land which the requirements of

modern civilisation have everywhere created? On this point there has been considerable diversity of opinion among the Commissioners themselves; and innovations in the law of property of a most arbitrary and even revolutionary character, have found support among the members of their body. One very liberal member proposes to abolish in a sweeping way every description of existing rights in security; and to issue, under the authority of a land tribunal, a limited number of transferable debentures which might be kept *in retentis* by the proprietor, or issued from time to time, when it was desired to borrow money upon the security of the estate. Beyond the value of these debentures he would not be allowed to borrow a sixpence upon real security, no matter how urgent his necessities, or how easily, in a commercial sense, the money could be obtained. Now, we care not what the political advantages of this scheme may be, and we do not deny that it has some. Englishmen have an obstinate habit of thinking that every man has a right to do what he will with his own, and to ruin himself, if he is so pleased, in his own way. We cannot conceive a more despotic interference with proprietary rights, than such a device to restrict the landowner in his powers of mortgaging or otherwise disposing of his estates; and we do not anticipate that this scheme of Mr Scully's will receive any effective support in Parliament. A majority of the Commission have, however, recommended that only fee-simple titles should enter the register of transfers. An exception might be made, they think, in favour of rights of life-rent. But leases and mortgages should be recorded in separate registers; and all other rights, it is proposed, should be protected, if necessary, by the entry of a "caveat" on the record, which would have the effect of a prohibition to sell. Under this system a purchaser would be enabled to satisfy himself, by a mere inspection of the register, both as to the legal title and the amount of the incumbrances. The removal of the caveats would be matter of arrangement between the seller and the parties interested; and in the event of parties insisting without sufficient title in maintaining such prohibitions, the caveat might be cancelled on a summary application to the Court of Chancery. For our part, we would not willingly exchange our simple and accurate land registers for a complex system like this, with its impracticable classification of rights and strange medley of quasi-litigious and merely ministerial procedure. Why, the very question, whether a party entering a caveat had, or had not a right of property, might involve matters of law fit for the decision of the highest tribunals. There is hardly a disputed question in the law of real property that might not be raised under such a form of diligence, which questions it is proposed should, in all cases, be determined in a summary process. Surely it would be more satisfactory to allow the purchaser to accept or decline the transaction on his own responsibility and his own opinion of its probable validity, than to force the parties into litigation, more especially as legal remedies

would still be available, if he were dissatisfied with the title. But the effect of the Commissioners' system would be, that all questions relating, however remotely, to the subject of sale, must be judicially solved at once and for ever, before the registrar would be at liberty to enter a new disposition on the record. Far simpler and more reasonable, in our opinion, is the plan recommended by Mr Headlam in an appendix to the Report. He would retain the register of the fee-simple ownership as the leading entry, and would enter as subordinate to it every qualified, contingent, or subaltern right that might emerge, stating concisely the nature of the right, with a reference to the deed of constitution. After each original entry, he proposes that a blank should be left for the registration, in a tabular form, of all subsequent transmissions of such secondary rights during the continuance of the same fee. But as often as the fee-simple of the property changes hands, he insists that all former entries ought to be cancelled. A fresh account, as it were, would then be opened in the name of the new proprietor: and all outstanding provisions and incumbrances would be transferred to his debit—would be entered, in fact, as limitations of *his* title, just as they were formerly entered as limitations on the right of the previous owner. This transference of entries to the new volume would be made, as a matter of course, under the direction of the registrar; and as all the previous entries relating to the same property would be kept together, the transference would be a matter of simple copying from one page into another.

Two great advantages would thus be secured. First, it would be unnecessary for any purpose, in searching the register, to look beyond the last entry, for every subsisting incumbrance would be found under that head. Thus all risk of an *imperfect* search would be avoided; as it would be next to impossible to overlook or omit an entry when the whole series were arranged in consecutive order. The other advantage to which we have referred is, that there never could be any difficulty in discovering an entry from the indices. We are not aware, indeed, that the experience of the Scotch Register Office affords much support to the objections that have been raised in England on this score. But it would seem to be a general opinion among English lawyers, that great difficulty would be experienced in classifying the registers in such a way as to make sure of finding and collating every entry relating to the same estate. If the method of Mr Headlam were followed, all the entries would at once be discovered by a simple inspection of the last certificate of registry. As each parcel would be marked on the Ordnance maps with a number connecting it with the registered title, any fraudulent attempt to set up an independent series of titles to lands already on the record, would be certainly defeated; the numerical reference being already marked on the official map, would show that these lands were already held by a public title, and the registrar would refuse to enter any new deed as an *original* writ. If it were desired at any time to

provisions of the new Act, in lieu of the principal deed, and which appear to us to be merely sasines under another name. For there could be no more difficulty in compiling an entry for the Minute-Book from a trust-deed than from any other dispositive instrument. Might it not be practicable to go a step further and, even without the aid of public maps, to realise the principle of a classified register? The sasine Minute-Book is, perhaps, the most perfect example in the world of a "Register of Title"—containing no more than is necessary to identify the subject of conveyance, the owner, and the nature of his right. To obtain the full advantage of Mr Headlam's plan, it is only necessary to introduce a new principle of arrangement; an alteration which would not even require the sanction of Parliament. The required arrangement has already been explained. Writs relating to the same subjects should be entered in consecutive order; and on the occurrence of a change in the principal title, all uncanceled entries of subordinate rights, or rights in security, would be transferred to a new registry commencing with the title of the actual proprietor.

The only serious danger anticipated from the introduction of such a system into England has long since been obviated amongst ourselves. We mean the possibility already adverted to of a fraud being perpetrated by parties coming with a fictitious disposition, and claiming to have it recorded as a title to *unregistered* lands. If the leading name were slightly altered, it has been thought that, but for the security afforded by the use of maps, a new title might be smuggled into the registry which, being indexed and recorded apart from the rest, would escape observation, and might ultimately grow into a prescriptive title. In Scotland, the excuse for attempting such a fraud would be wanting. Every yard of land in the kingdom being already on the record, no new entry could be made except in the way of substitution for one already there. Therefore, either the last entry must be cancelled in virtue of a forged authority to that effect—a fraud which would be discovered the next time a genuine deed was sent for registration, and so no harm would be done; or, failing such an authority, the fraudulent deed must be entered in consecutive order after the genuine titles, where it would appear as a qualification of the actual fee.

Were the system of a classified minute-book in operation, it is obvious that a *search* would become unnecessary. An *extract* from the minute-book, of the existing title and incumbrances, would be furnished in its stead; and purchasers, besides saving the expense of a search, would no longer incur the risk of a deed being overlooked by the searchers. As it has been publicly stated that a consolidation of our land registers is in contemplation, we trust that advantage will be taken of such a fair opportunity, to remove what is superfluous in these most useful records, and to introduce such changes as will make their contents more readily available for the wants of the public.

THE NEW LEASEHOLD TENURE.

THE Registration of Leases Act, in making a perpetual lease effectual against singular successors, has virtually introduced a new tenure of land. The advantages and disadvantages which will result from a leasehold tenure, are as yet matter of speculation, and it is both a difficult and delicate task to endeavour to anticipate them. The object of the present article is merely to present a few practical observations, which may assist in determining the cases in which a leasehold tenure is advisable.

At first sight, a lease in perpetuity seems to differ little from a feuholding. There are, however, several important peculiarities in the nature of the two rights respectively, which will lead to serious differences in their practical results, unless care is taken to prevent or modify them by express provisions. This will more clearly appear when some of these differences are considered.

In Feu, whole Property is conveyed—in Lease merely use.—When a feu is granted, the whole property of the lands is transferred to the vassal, *a cælo usque ad centrum*. The right of superiority retained by the granter is incorporeal. On the other hand, a lease conveys no more than a right of possession and use. From this it follows, that minerals, etc., belong to the person who gets a feu, but not to a tenant under a lease. There is nothing, however, to prevent a proprietor who grants a lease from conveying the right to the minerals as well as to the lands; and it is equally competent for one who grants a feu to reserve the minerals.

A tenant, in taking a perpetual lease of a house, should see that the ground on which it is built is expressly let to him; otherwise the lease might come to an end from the destruction of the house.

In Perpetual Lease, Tenant should get right to use as if Proprietor.—In taking a lease instead of a feu, a tenant should see that he gets, in express terms, as full and unqualified a right to use the subjects, and all accessories as if he were proprietor; otherwise a tenant having a perpetual right might be prevented by a landlord from building on his own ground, or using it for any purpose not agricultural, if the subject was agricultural at the commencement of the lease. He might, in the same way, be prevented from taking down houses, or changing the nature of the subjects let. The interest of the landlord, as having right to rents, and a right to take possession on failure to pay rent, might be held to be sufficient to entitle him to interfere. The lease should also convey to the tenant a right to all servitudes. It might be fair that the tenant should have a right to all the beneficial interests that may arise to the proprietor in respect of the lands, except the rent, or compensation for the rent;

but it may be doubted whether such a stipulation would be effectual, at least against singular successors.

In Lease, no Casualties.—A proprietor, in granting a lease instead of a feu, should take into account that he will get no casualties, and adjust the rent accordingly.

When Proprietor cannot feu, he may grant a Lease.—When a proprietor is prevented by his titles from sub-feuing, there seems to be no reason why he may not legally grant a perpetual lease.

A leasehold tenure may also be had recourse to when a vassal is burdened with a clause of pre-emption. It may be maintained, that a perpetual lease is an alienation; but the decision in the case of *Lumsden v. Lorimer and Others* (Feb. 4, 1843, 5 D., p. 50) seems to be against such a plea.

In this case, a vassal, who was bound by her feu-charter not to sell or alienate the subjects until she had made the first offer to the superior, had granted a lease for nineteen years, for payment of L.26, payable on entry, and a yearly rent of 17s. 6d.; while she bound herself, at the end of the lease, to take the buildings erected by the tenant at a valuation, and, failing her doing so, to grant a continuation of the lease for other nineteen years, and so on at the end of every nineteen years. It was held by the Court, that this lease was not an alienation. The lease in this case was not a perpetual lease; but the remarks of the late Lord Justice-Clerk apply equally to such leases. His Lordship said, "I am of opinion that this lease is not an alienation. Such a question, when it arises between a superior and vassal, is essentially different from the point which occurs, whether, alienation being prohibited for the benefit of others, the granter has not truly alienated to the prejudice of these parties—as in long leases under entails prohibiting alienations, and similar cases. I apprehend that we must interpret this clause in reference to the relation of superior and vassal; and I cannot hold that any lease, or any right which not only does not place a new vassal in the fee, but does not create even a base infetment in the property, can be taken to be an alienation under this charter. The superior would not be bound to recognise any sub-feu, if his interest required him to take possession. What the vassal has done is simply to let."

Lord Moncreiff observed, "I suspect that the proceeding of the lease is for the purpose of defeating the right of presumption; but I do not think it can be reached: I do not think that this lease was an alienation."

Burgage Subjects—Conditions.—As proprietors of burgage subjects cannot grant feus, the only way in which they can reserve an interest, is by so embodying conditions in the conveyance, that they shall appear as real burdens in the new vassal's titles. The great objection to this system is, that the right of the disponent rests upon a stranger's title; and that, in subsequent transmissions of the property, the conditions may be left out, without the knowledge of the

proprietor of the reserved rights. The transmission of such reserved rights is also awkward. One disadvantage is, that the assignation must be completed by intimation, and intimation is personal to the individual who gets it. An intimation is required not only at every transmission of the reserved right, but at every transmission of the lands, when the new vassal cannot know from his title who has right to the burden. A *bona fide* payment to one not having the rights would be a good defence. A perpetual lease would be liable to none of these objections. It would have this further advantage for the grantor, that he would still be proprietor of the lands, instead of having a mere right to a ground-annual, and would have all a proprietor's remedies against his tenant. "A reserved burden, though real (and so giving the remedy of poinding of the ground), gives no active title to raise an action of mails and duties, so as to affect the rents, nor power to assume possession. In order to accomplish that, adjudication must be led."—Bell's Prin., sec. 922.

There is one peculiarity in the nature of a lease which makes it well adapted for those cases in which a proprietor wishes to alienate, under a number of conditions,—which is this, that the original lease continues to be the title of the tenant, however long he may have possessed, and however often the right may have been transmitted. All conditions, therefore, which would bind the first tenant, would seem also to be binding upon each successor to the end of time. Many difficult questions, as to whether certain conditions are or can be made real burdens, which would arise with singular successors, would be saved by making the grant in the form of a lease; and besides this, all risk from the omission of the conditions in future titles would be avoided. These conditions and limitations on a purchaser's right are often very valuable.

Entail by means of Perpetual Lease.—It is possible that, by means of a lease, lands may be settled upon a certain series of heirs. Such a destination might, however, be defeated, with consent of the landlord, by an heir in possession renouncing the lease, and getting a new one. If an heir of line made up his title to a lease in favour of another heir, the landlord would not be bound to accept him as tenant. A tenant in possession has no right to assign a recorded lease, except "in accordance always with the conditions and stipulations of such lease," and he could only assign in security under these conditions; so that by the lease he might be effectually prevented either from assigning or burdening the lease.

Landlord should be relieved of all Public Burdens, etc.—In granting a perpetual lease, a proprietor should take care to bind the tenant to relieve him of all burdens affecting the lands, or which may come subsequently to affect them. It is to be feared that there is no way by which the proprietor can escape from his primary liability for these burdens, however slight may be the interest he has in the lands in the shape of rent, and however valuable the subjects may have become; and it is the more necessary, on

that account, that the lease should contain a specific obligation on the tenant.

All manner of contingencies which may affect a proprietor should be carefully provided against, so as to throw the whole liabilities upon the tenant.

Expense of Titles.—Perhaps the chief advantage to be derived from the use of the perpetual lease, is in the facility and cheapness with which titles may be completed, both in the person of the lessee and of every successor. It would, however, be idle at the present moment, when so many changes have just been made in feudal conveyancing, to attempt a comparison between the probable expenses which will in a course of years attach to a leasehold and feudal tenure respectively, in the necessary completing of titles.

Assignations in Security and Assignations.—The facilities for using a recorded lease as a fund of credit, by means of assignations in security, appear to be as great as those possessed by a proprietor. Leases may also be assigned in whole or in part.

Lease required for each Fifty Acres.—It must be kept in view, that if the subjects let exceed fifty acres, more than one lease will be required.

THE NEW STATUTES.

THE SMOKE ABATEMENT ACT.

ON the first of August last, there came into force an Act, passed in the session of 1857, entitled, an "Act for the Abatement of Nuisances arising from the Smoke of Furnaces in Scotland" (20 and 21 Vict., c. 73). We are not in the habit of occupying much space with mere matters of police; but the interests affected by this statute are important, the subject it deals with is surrounded with difficulties, and questions of some embarrassment may arise in the course of its operation. We shall, therefore, briefly explain its provisions.

The Legislature did not propose to put down smoke, because it is a necessity of the nineteenth century. The object it had in view was merely the purification of the atmosphere of our large towns, by the compulsory use of apparatus which has been found, by experiment, to be tolerably suited for the purpose. It therefore provides for nothing more than the abatement of the nuisance. The offence created is simply this—"the use of a furnace not constructed so as to consume or burn its own smoke;" or, "the negligent use of such furnace, so that the smoke arising therefrom shall not be effectually consumed or burned." Therefore, the first question which the magistrate will be called on to solve, is entirely one of taste—to be determined, not by well-defined rules of law, but by his own sense of propriety. What is the effectual consumption of smoke? Probably a citizen of Edinburgh, Glasgow, or Dundee.

would all differ on the point. What would be effectual compliance with the statute in the eyes of the one, would be a gross infraction in the opinion of the other. The first point, as to whether the furnace is properly constructed, will be determined by scientific evidence; but what is such negligent use, so that the smoke shall not be effectually consumed, seems to leave a wide margin for the exercise of that judicial discretion which was long ago said to vary with the judge's foot—one having a long foot, another a short foot, and a third an indifferent foot. The Act is, therefore, open to the objection, that its application throughout the country cannot be made uniform.

This consideration is made still more apparent by sec. 2, providing that the words, "consume or burn the smoke," shall not be held in *all* cases to mean, "consume or burn *all* the smoke." As there are not told in what circumstances they shall mean anything else, this is equivalent to saying, that in *no* case is anything beyond partial consumption made imperative. Further, the magistrate may remit the penalties, if of opinion that the party has "so constructed or altered his furnace as to consume or burn, as far as possible, all the smoke arising from such furnace, and has carefully attended to the same, and consumed or burned, as far as possible, the smoke arising from such furnace." This imposes a most invidious duty on the sheriff. What does he know about this branch of mechanical engineering? The matter is fitter for the adjudication of a jury of firemen. The offence, then, is (1) the use of a furnace not constructed according to the best patent; and (2) the negligent use of one properly constructed, so that it belches forth its fumes to a greater degree than the magistrate may think necessary or desirable.

The Act applies (1) to a furnace employed in the working of engines, stationary or locomotive; (2) a furnace *on board* of any steam-vessel, in or at any port, pier, landing-place, or harbour, or lying on a river not exceeding a quarter of a mile in breadth; (3) every furnace employed in a mill, factory, distillery, brewhouse, sugar-refinery, bakehouse, gas-work, water-works (although a steam-engine is not employed therein), or public bath or wash-house (although not used for the purposes of trade or manufacture).

With respect to the first class, reference may be made to the Railways Clauses Act, 8 and 9 Vict., c. 33, sec. 107, whereby every locomotive steam-engine to be used on a railway shall, if it use coal, or other similar fuel emitting smoke, be constructed on the principle of consuming, and so as to consume, its own smoke; and if any engine be not so constructed, the company or party using such engine shall forfeit five pounds for every day during which such engine shall be used on the railway. The furnace on board of a steam-vessel must be employed in the working of an engine. Some difficulty may be found in deciding when a steamer is *in or at* a harbour. It apparently means that, if not moored, it should

at least be run alongside the pier. The third class comprehends a pretty exhaustive list. At the same time, it is proper, in construing such Acts of Parliament, to bear in mind the rule, *expressio unius est exclusio alterius*, as to the application of which, see Dewhurst v. Fielden, 8 Scott N. R. 1017.

Liability for the penalties attaches to every person or company being the owner or occupier; 2. The foreman or other person employed in connection with the furnace, or the master or person in charge of the steamer (sec. 1). Where several persons are jointly answerable, proceedings may be taken against any one or more of them, without proceeding against the rest; "but nothing herein contained shall prevent the parties so proceeded against from recovering relief in any case in which they would now be entitled to relief by law" (sec. 11); and, by sec. 5, "no decree, under this Act, against any party shall bar his right to relief against any other party legally liable." The most obvious case for the application of this proviso, is that of joint owners or occupants. But in what other cases, under this Act, is a party complained upon entitled to relief by law? *Culpa tenet suos auctores*; but the proviso seems to make an exception to that well established rule. Has the foreman an action against his employer for the penalties he is made to pay, by reason of defective machinery? or the master against his servant, by reason of his negligence? or would a penalty, under this Act, enter as an item of damage in an action against the maker of a defective furnace?

It is settled in English law, that volumes of smoke, or noxious effluvia emitted from a manufactory, are a *public* nuisance (in contradistinction to a nuisance of a private character)—the remedy at law being by indictment—the remedy in equity by information at the suit of the Attorney-General. So, in this Act, it is provided that no complaint is to be heard unless it is at the instance of "the local authority;" i.e., the Procurator-Fiscal of the burgh, county, or district; or (2) the Commissioners of Police; or (3) "the owner or occupier of premises, with reference to which the furnace is so situated as to create an annoyance,"—in all cases with concurrence of the Lord Advocate. The principle of the right to prosecute under statutes creating a *malum prohibitum*, may be illustrated by *Chamberlaine v. The Chester and Birkenhead R. C.*, 1 Exch. 870.

The procedure is summary. A petition referring to the clause of the Act on which it is founded, without setting it forth, is presented, where the place of the offence is not a burgh, to the sheriff, sheriff-substitute, or any two justices having jurisdiction in the place, or *adjacent* to the port, pier, etc. The use of this word *adjacent* is quite superfluous, and may give rise to questions which should be avoided, by discarding in every case the amateur magistracy. If the *locus* is a burgh, then the jurisdiction is vested in the sheriff or the magistrate. The first order may be either for answers in three days, or that parties attend in person forthwith.

Within five days thereafter a proof may be taken ; and within three days after the conclusion thereof, decree is given for penalties and expenses (sec. 4). The first penalty is not to exceed L.5, nor be less than 40s. The second is L.10 ; and for each subsequent conviction, the fine last paid must be doubled (sec. 1). Expenses may be awarded against the party complaining (sec. 8). Appeal is absolutely excluded (sec. 9), save in one case only. If the sheriff or magistrate is of opinion that the cost of the operations necessary to amend any furnace will exceed L.25, they certify an opinion to that effect, and stop the proceeding. Against this judgment parties may, within three days, appeal to the sheriff, and, after him, to the Lord Ordinary on the Bills, whose judgment is declared to be final (sec. 7).

Such is the substance of this remarkable measure. It is one in which the profession are entitled to take a warm interest.

THE TITLES TO LAND ACT.

THE new system of conveyancing comes into operation with the present month. We have no hesitation in designating the varied and sweeping changes introduced by the recent statute as a new system, because so many old forms have been abolished, and so many new writs introduced, that a complete revolution has been effected. In a comparatively short period, a race of conveyancers will spring up who will look with curiosity upon an instrument of sasine ; who will pass over, as practically useless, those portions of treatises upon conveyancing which discuss the obligation to infest and the precept of sasine ; and who will fail to comprehend why the register of titles should be termed the Register of Sasines. The Act, indeed, leaves optional to constitute, transmit, or complete land rights according to the forms now in use ; but the same option was given in former statutes introducing conveyancing reforms, and yet the reforms have been as fully carried into effect as if the changes had been compulsory. At the same time, a clause of this nature leaves a convenient door of escape for the conveyancer, should he, unfortunately, in the course of practice, meet with a confused title that can only be completed according to the old rules and forms. He would be a bold man who could venture, while the Act is still untried, to assert that it will never be necessary to fall back upon the optional clause, although we are confident it will be so seldom used, that before the prescriptive period has elapsed, conveyancers may be met with who know as little about instruments of sasine as the present generation know about Letters of Four Forms, or any other obsolete juridical style. It is possible that some timid or unscrupulous agent may continue, under cover of this clause, to inflict upon

his client unnecessary expense ; but the remedy for such an evil is in the hands of the client himself, and he neither requires nor can possibly obtain the assistance of the legislature in applying it. The conscientious lawyer, who is fitted for his profession, will at once grapple with the difficulties of the new system, and endeavour to carry out the statute not only in its letter but in its spirit.

The Act received the royal assent upon the 2d of August. The only provision which it contains with reference to the time when it was to come into operation, is in the first section, which provides, that from and after the 1st day of October, in the present year, it shall not be necessary to expedite and record an instrument of sasine on any conveyance of lands. The second and subsequent sections do not in any way refer to the date specified in the first section, and the question has been mooted, whether, according to a strict interpretation, all the clauses, with the exception of the first, did not come into force from the date of the royal assent. The question is more speculative than practical, as we do not believe any practitioner in Scotland would be so bold as to commence any portion of the new system before the 1st of October, while the optional clause saves the effect of any deeds executed according to the old form. The only practical good to be obtained from now discussing such a point, is to warn legislators from following the style of the Act if it can be shown to be defective. Mr Ross, in his recently published brief but clear "Analysis,"¹ states (p. 18), that "Section I. declares, that the Act shall come into operation on the 1st day of October in the present year." But section I. gives no authority for this broad statement. It contains no provision as to the time when the Act was to come into operation, but only fixes a date when it should no longer be necessary to expedite and record instruments of sasine. There are various clauses which have no necessary dependence upon the first, and which, indeed, refer to subjects entirely different. Such, for example, is the 27th, which treats of diligence against apparent heirs, and cuts down the *annus deliberandi* to six months. Does this section take effect from the 2d of August or the 1st of October? If an action has been raised against an heir betwixt those two dates, and the summons contains the requisite conclusions, is one action alone necessary, or must there be two actions, one of constitution, and another of adjudication, as formerly? Since the debateable period occurs during vacation, it is very improbable that the question will ever arise in practice; and if it did, the Court might be more inclined to regard the obvious intention of the legislature than to countenance ingenious speculations; but there is sufficient room for doubt, as the Act stands, to make it unadvisable to follow such a precedent in future. Each section after the first ought either to have commenced with the expression, "from and after said date," or the less clumsy and much more explicit method been

¹ Analysis of the Titles to Land Act, by George Ross, Esq., Advocate-Edinburgh: Thomas Constable and Co.

adopted, of stating in a specific clause the date at which the whole Act was to come into force.

Mr Ross very properly describes the leading feature of the statute to be, the recording of a conveyance of lands in the Register of Sasines, in place of an instrument of sasine following upon the conveyance. As we strenuously urged this reform when there was no great hope of obtaining it for a considerable period, it is unnecessary to discuss afresh the policy of the change; but a few commentaries upon the various sections of the Act may prove useful to the profession.

Section I.—The abolition of the instrument of sasine is effected by the provisions in section first; but it is doubtful whether the interpretation clause, which is delayed to the last, might not with more propriety have been placed at the beginning. Section first, when read by itself, seems to be particularly meagre, as it only provides that, after the date already mentioned, it shall not be necessary to expedite and record an instrument of sasine on any conveyance of lands; and we are aware that practitioners have already been exclaiming against the Act, on the ground that it contains no provisions applicable to other cases, such as an instrument of sasine upon a decree of special service. They have overlooked that the interpretation clause confers upon the term “conveyance” a very wide signification, as will be seen from the following table:—

By Section 36, it is provided that the words “Deed” and “Conveyance” shall extend to and include—	Original Charters. Charters of Resignation. Charters of Adjudication. Charter of Sale.	Bonds and Dispositions in Security. Bonds of Annuity. Bonds of Annual Rent. Other Heritable Bonds.
	Fen Contracts. Contracts of Ground-annual. Contracts of Excambion. Dispositions.	Decrees of Adjudication. Decrees of Sale. Decrees of Special Service. Precepts from Chancery. Precepts of Clare Constat.
	Writs of Resignation. Writs of Clare Constat. Writs of Acknowledgment.	Other Deeds and Decrees by which lands are conveyed; or Rights in land, either absolute or redeemable, or in security, are constituted or conveyed.
	Official Extracts of any such Deeds, Conveyances, and Decrees.	

Section first thus abolishes, or rather, according to the milder phraseology which is alone properly applicable to Acts not com-

pulsory, dispenses with, the instrument of sasine entirely, as the interpretation clause not only enumerates all the deeds upon which instruments of sasine were in use to be expedite, as being comprehended under the term "conveyance;" but provides, by general expressions, for any deeds or decrees which may have been omitted in the enumeration. The only exception which may possibly yet survive, is the sasine *propriis manibus*. It was not touched by the former conveyancing statutes, and when passed, as it very rarely was, had to be expedite according to the forms in use before the 8 and 9 Vict., c. 35. The peculiarity of this instrument is, that it is not necessarily an instrument of sasine on a conveyance of lands, which is the only case provided for by the recent Act; but it is of itself a conveyance, being used for the purpose of constituting or securing provisions by husbands to their wives, or parents to their children; and, in this view, it would seem to be left as a solitary remnant of the ancient practice. The style will still commence with the solemn words, "In the name of God, Amen;" and the act of sasine can only be performed by giving, on the spot, earth and stone of the ground of the lands.

Before 1st of October 1845, when the Act 8 and 9 Vict., c. 35, came into operation, sasines required to be registered within sixty days after their date. That Act abolished the date of the sasine and the necessity to register within sixty days, and introduced the new practice of making registration competent at any time during the party's life, and that the date of presentment and entry should be the date of the sasine. The present Act provides that the conveyance, being presented for registration with a warrant specifying the person on whose behalf it is presented, and being recorded along with the warrant, shall have the same legal effect as if an instrument of sasine had been expedite and recorded at the date of recording the conveyance. There is no limitation as to the time when the conveyance may be recorded. It is not within sixty days of its date, nor yet within the lifetime of the party in whose favour it is granted. But although this latter limitation is not expressed, it is practically implied, as the warrant for registration must be signed by the person on whose behalf it is presented, or by his agent; and practitioners will thus see the propriety of having conveyances registered as soon as possible after execution. No new system of preferences has been established; so that it remains, as heretofore, according to the priority of registration. It is important to keep in view, that the registration of the conveyance is only equivalent to a registered sasine in favour of the party specified in the warrant; and in order to carry out this principle, the warrant must be recorded along with the deed. The warrant is the measure of value of the registration; and no party can benefit from the registration but those specified in the warrant, in the same way as if no infestment has been passed in their favour. This is a perfectly proper provision, as some of the parties to the deed might not choose to register;

and it will tend to keep the title distinct, where different lands have been conveyed in the same deed to different parties. At first sight it may seem that a clause should have been added, to prevent the same deed being recorded again and again, merely because it, or an extract of it, has been presented for different parties. But, on reflection, it will be evident that there are practical difficulties in the way, which would render any such provision nugatory. Throughout the series of statutes by which conveyancing has been reformed, care has been exerted to preserve feudal principles intact, and however great an innovation dispensing with the instrument of sasine may be, it cannot be objected to as inconsistent with these principles. In his recent valuable treatise, Mr Rodger has shewn, that the instrument of sasine was not in common use until the end of the fifteenth century, so that, by its abolition, we only revert to the purer practice of the time when feudalism was in the zenith of its influence. Then, however, although there might have been no instrument, the ceremony of giving sasine was invariably observed, and it is curious to note the various changes by which we have arrived at the present stage. In the earliest times, the ceremony was everything, and the notarial instrument containing a record of the ceremony almost, if not entirely unknown. Afterwards, the instrument came to occupy a much more prominent position than the ceremony, and however carefully the latter might have been observed, if the circumstance was not recorded in a deed strictly according to the technical style which had sprung up, the ceremony of itself was disregarded. To the prominence given to the instrument we owe the system of registration, and with the introduction of registration a new step in the progress. Thereafter it was not the ceremony, nor was it the instrument which *per se* were of any avail, it was the registration of the instrument which alone stamped it with validity. The practice continued thus until 1845, when Lord Advocate McNeill's Act dispensed with the ceremony, which had degenerated into an expensive joke, but retained the instrument, while giving still greater prominence to the registration. The present Act is the logical sequence of these various steps. The instrument swallowed up the ceremony, and now registration has dispensed with the instrument. The recording of the conveyance is henceforth to be held as equivalent to the expeding of infestment, and sasine, whether in fact or in deed, is numbered among the things of the past. Still the feudal principle is preserved intact, because registration of the conveyance is expressly declared to be only an equivalent to an instrument expedited and recorded. Conveyancing reform is in these days worked out by equations.

Sections II and III.—These sections contain provisions relative to the registration of conveyances. When an instrument of sasine was expedited, the notary had it in his power, and intelligent and conscientious notaries did not fail to exercise the power, of excluding

from the *sasine* all the clauses of the conveyance which were not necessary to the validity of the instrument. When, however, it was provided, that the conveyance itself was to be recorded, the register ran some risk of being overloaded with the details of trusts and family settlements, which had no connection with the facts which the registers were designed to exhibit, viz., the proprietorship and burdens of the landed property of the country. Two methods have been provided to mitigate (as it will be impossible altogether to cure) the evil. The first is, that where it is desirable to prevent the purposes and objects of marriage contracts, trust-deeds, or deeds of settlement from entering the record, or where it is wished only to record one part of a deed which conveys either separate lands or separate interests to the same or different persons, a notarial instrument must be expedite and recorded, setting forth generally the nature of the deed, and containing, at length, the special portions which are to enter the register. The other method is by inserting immediately before the testing clause of the conveyance, a clause of direction, specifying the parts which the grantor desires to be recorded. There is some complexity in these remedies, which, perhaps, it was impossible to avoid. On the one hand, it may seem little gain to have abolished the notarial instrument of *sasine*, if it is only to give place to the notarial instrument of registration, while on the other hand, the clause of direction, according to the form given, will not only be an unsightly object in a conveyance, but may be, to a great extent, disregarded by the grantees, to whom is properly reserved the power of acting upon it or setting it aside. The section providing for this clause, appears to have been introduced, when it became evident that the notarial instrument of registration bore a remarkable resemblance to the instrument of *sasine*. It will be more used in charters from the superior, feu contracts, and such-like, while the notarial instrument will probably be more generally adopted in practice, and appears to be the preferable mode. The form given in the schedule is brief, and both the deed and the register will be saved from the incumbrance of a clause of direction, specifying, according to the style provided, the various parts "from the words (*insert words*) on the line of the page to the words (*insert words*) on the line of the page," which are to enter the record. As the Act gives a choice of methods, it might have gone a little farther, and permitted directions for the registration to have been given in the warrant. A power of this kind is evidently intended to be conferred on the party entitled to present a conveyance for registration, who desires to record the whole, in place merely of the parts specified in the clause of direction. The words in the third section are,—“Notwithstanding such clause of direction, it shall be competent for the party entitled to present the conveyance for registration to record the whole conveyance, or to expedite and record a notarial instrument, as herein-before provided, in the same manner as if the conveyance had contained no such clause

of direction." Mr Ross assumes (*Analysis*, p. 5, sec. 4) that the desire of the party to have the whole conveyance recorded, may be expressed in the warrant of registration; and it is evident that, if he is to have the power at all, he can only exercise it in this manner. But a practical difficulty will, doubtless, be felt, from the absence of a schedule containing the form of such a modified warrant. The words which we have quoted make it competent for the party to record the whole conveyance, in the same manner as if the conveyance had contained no such clause of direction. But this can only be done under the provisions of section first, and the relative schedules, which give no authority for altering the warrant of registration, so as to carry out the provision in section third. If it be held competent for the party to make such an alteration on the statutory form of warrants of registration, as to express a desire to have the clause of direction disregarded, and to obtain the whole conveyance recorded, has he not also the power to insert in the warrant of registration his desire for a modification of the clause of direction, to save the necessity for engrossing the whole deed? It rather seems that, although the party may be entitled to set aside the whole clause of direction in the warrant of registration, to the effect of recording the whole deed, he could only obtain a portion of the deed recorded, containing more than was desired to be registered by the clause of direction, but still less than the whole, by expediting a notarial instrument. Neither by the warrant of registration, nor by notarial instrument, is it competent for the party in right of the deed to record less than is contained in the clause of direction. On the whole, the latter part of section third is rather confused and intricate, and it would be wise for conveyancers to refrain from the use of the clause of direction, in all deeds where there can be any probability of the grantee desiring to have it recorded differently. In the general case the grantee is the proper party to determine what portions of the deeds in his favour shall enter the record, and the notarial instrument is a much more professional and satisfactory mode of proceeding, where the whole deed is not to enter the register, than the clumsy and confused method of the clause of direction.

Before leaving these sections which introduce the writ denominated a notarial instrument, it is proper to point out that by the twentieth section, it is provided, that where "any obligation, burden, condition, qualification, or other matter" has been appointed to be inserted or referred to in the instrument of *sasine*, or of resignation *ad remanentiam*, applicable to any lands, "such obligation, burden, condition, qualification, or other matter" must be inserted or referred to in any notarial instrument applicable to such lands, which may be expedite in virtue of the Act.

Section IV.—By this section it is provided, that when a procuratory of resignation *ad remanentiam*, or a conveyance containing an express clause of resignation *ad remanentiam*, is recorded, along with

a warrant of registration, similar to those already referred to, in the appropriate Register of Sasines, it will no longer be necessary to expedite an instrument of resignation *ad remanentiam*. The recording of the conveyance or procuratory is to have the same effect as a properly recorded instrument, in the same way as the recorded conveyance is equivalent to an instrument of sasine, duly inserted in the proper register. As the Act is not compulsory, a new form of instrument of resignation has been provided, to make the style more in unison with that of instruments of sasine; but this seems a piece of unnecessary elaboration. If parties do not choose to adopt the admirable system provided in the Act, it seems rather to be paying too much deference to personal tastes and wishes to provide an intermediate stage. Of course, the permission to expedite resignation *ad remanentiam* by three methods, which is now the case, is no more than is conferred upon infeftments. These may either be completed by recording the conveyance, or by expediting an instrument according to the recent style, or according to the style in use before 8 and 9 Vict., c. 35, came into operation. Surely no conveyancer can complain of the peremptory character of modern legislation!

We cannot close this first article upon the important measure which now comes into operation, without referring to gross blunders in the printing of the Act, as it is issued from the press of the London printers to the Queen. In the ninth section, the short but most important word, "not," has been entirely omitted, destroying, as we shall hereafter show, the whole section, although Mr Ross assures us (*Analysis*, p. 19), that in the impression of the bill printed by virtue of the order of the House of Commons, dated 1st July 1858, the section was correctly given. The rubric of the seventh section is printed, "Provision *when laws* are held of a subject superior," instead of the words, "*where lands* are held," etc. The rubric of the eighth section reads, "Provision where lands are held of the crown, etc., and a new investiture by *Registration*, etc. required," instead of "a new investiture by *Resignation*." And, in the thirty-second section, the title of the Act 6 and 7 Will. IV., c. 33, is quoted as "An Act to amend and regulate the law of Scotland as to erasures in Instruments of Sasine and of *Registration ad remanentiam*," instead of "*Resignation ad remanentiam*." With the exception of the one first mentioned, these blunders may not be of much practical moment; but they certainly ought to have been carefully avoided in a statute of the importance of the Titles to Land Act.

(To be continued.)

TRIBUNALS OF COMMERCE.

PROPOSALS to establish Tribunals of Commerce among us having been occasionally matter of discussion, I have thought it worth while to state shortly what these tribunals are in their own country, their constitution and functions.¹

In every one of the eighty-six departments (or shires) into which the territory of France is divided there are two or more Tribunals of Commerce. Their number and local position is determined by Government, according to the business and population of the district. Each tribunal is composed of a president at the head of not less than two, nor more than fourteen, judges, all of whom are mercantile men and serve gratuitously. There are also in these, as in most other French tribunals, supplementary or assistant judges to make up a quorum in the event of illness or absence of the ordinary members of the Court.

The president and judges, both ordinary and supplementary, are all elected at a meeting convened for that purpose, and composed of the leading members of the mercantile community (*commerçants notables*), "chiefly," so runs the enactment of the code, "heads of mercantile houses the oldest and best known for their honourable character, their spirit of order and economy."

It must not, however, be thought that the mercantile community of any district are allowed themselves to draw the line between those of their own body who are and those who are not "notable" merchants, and so fit to be constituent members of this electoral college. Here, as in almost every part of the public administration of France, we have an example of that excessive interference of the central Government in local matters by its representative the *Préfet*, the highly salaried governor of the Department, who is himself removable at the will of the Home Office. The list of "notable" traders, says the code, "shall be struck out of all the traders of the district by the *Préfet*, and approved by the Minister of the Interior; their number cannot be less than twenty-five in towns of which the population does not exceed 15,000 souls; in other towns, it must increase in the ratio of one elector for 1000 inhabitants."

I shall not here stop to speculate how far a merchant who has rendered himself obnoxious to the local representative of central authority by the energy of his political opinions, is likely to become even an elector of the commercial judges of the district, far less to be himself promoted to that honour. It is enough for my present pur-

¹ The sources of information which I have consulted in preparing this short paper, are Maurice Block's *Dictionnaire de l'Administration Française*, p. 1034; the *Code de Commerce*, and the *Collection des Loix*, vols. i., p. 333, xvi., p. 406, and xl., p. 18. See also Robert Jones' *History of the French Bar*, p. 13, and Westoby's *Legal Guide for Residents in France*. All these books are in the Advocates' Library.

pose to say, that the members of court go out of office at the end of two years, when they may be again elected for another term of two years, after which they are not re-eligible till after the lapse of one year. The clerks and officers of court are appointed by the crown. The *ministère public*, or public prosecutor, who has a representative in every other tribunal, civil as well as criminal, has no place assigned him before the Tribunals of Commerce.

I am unable to determine the exact practical bearing of the following enactment of the code:—"Tribunals of Commerce are within the province, and under the 'surveillance,' of the minister of justice." Probably the tribunal, and the assembly by whom it is elected, are themselves powerless to remove any one of the judges who may have disqualified himself by misconduct. The degradation of the offender from his office will, I suppose, be an act of the crown on the report of the minister referred to in the enactment just quoted. As will be immediately seen, this provision of the code does not refer to the litigant's right of appeal.

The jurisdiction of the Tribunals of Commerce is even more extensive than their title would at first sight imply. They alone try not only questions arising between traders, merchants, and bankers, in the course of their business as such, but also all questions of mercantile dealing arising among all other persons. These mercantile dealings (*actes de commerce*) are specially enumerated in the code; it will be sufficient to mention here, by way of illustration, bankruptcies, bills of exchange, claims of wages by seamen of the merchant service, questions of freight and land carriage, marine insurance, borrowing and lending on sea risk. Recently a dispute arose between a dramatic author and the manager of a Parisian theatre as to an engagement to bring out a play before a certain day under a penalty. That question was heard and determined by the Tribunal of Commerce.¹

Attornies (*avoués*) practising before the ordinary law courts are forbidden to appear before Tribunals of Commerce, by a special enactment analogous in its spirit to our own unwise rule excluding procurators from the Small Debt Court. But certain persons holding a special mandate from the litigants are allowed to appear and plead under the title of *agréés*. As these persons make commercial pleading the ordinary business of their lives, they are plainly nothing else than attornies under another name. Advocates have the same right to appear and plead before a Tribunal of Commerce as before any other Court.

All commercial suits, as above described, must begin before the Tribunal of Commerce, whose judgment is final in cases below 1500 francs (L.60); and also in cases to any amount in which the finality of the decision has been consented to before it is pronounced. In other cases, appeal lies to the neighbouring Imperial Court. These Imperial Courts have an appellate jurisdiction over all the primary

¹ See Literary Gazette of 4th September last, p. 303.

tribunals of France, legal and commercial. They are twenty-seven in number, and from them appeal lies to the Supreme Court, the *Cour de Cassation*, or Quashing Court, in Paris.

When a commercial case reaches the Imperial Court, it ceases to be in the hands of mercantile men. It is thenceforward pleaded by lawyers, and determined by lawyers, just like any other ordinary cause. But at all the degrees of jurisdiction, the procedure in mercantile cases is as summary as possible. I may add, that in them, as in all other civil suits in France, jury trial is unknown.

I am doubtful whether the commercial classes of this country any more than the legal, would desire the naturalisation of Tribunals of Commerce among us. Their value consists in this, that all commercial litigations are determined at their first stage by men conversant with mercantile usage. But mercantile usage though often an element for consideration, is not always, nor even most commonly the turning point in a commercial law-suit. Questions continually arise between merchant and merchant which require nothing else than legal learning and skill for their solution, the mercantile usage on the subject being either undisputed or unimportant. Where, on the other hand, mercantile usage is a material element in a law-suit, either the evidence of competent witnesses, or better still, a report on the very point, by mercantile men specially chosen by the Court for the purpose, seems an amply sufficient guarantee that the usages of the country, so far as they are not inconsistent with the general law of the land, shall be recognised and given effect to by our legal tribunals. ICTVS.

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tences ; of that there can be no doubt ; but the real offence here was the issuing of a false wrapper, and inclosing false stuff within it. The issuing of this paper without the stuff in it would be no offence. In the printing of these wrappers there is no forgery ; the real offence is the issuing of them with the fraudulent matter in them." So, too, Willes, J., observes : " I agree in the definition of forgery at common law, that it is the forging of a false document to represent a genuine document. That does not apply here ; for it is quite absurd to suppose that the prisoner was guilty of 10,000 forgeries as soon as he got these wrappers from the printer, and if he had distributed them over the whole earth, and done no more, he would have committed no offence. The fraud consists in putting inside the wrapper powder which is not genuine, and selling that," etc. It appears from a note of the learned reporter of this case, that the defendant was subsequently indicted upon the same facts for obtaining money by false pretences, to which indictment he pleaded " guilty." This latter indictment was no doubt preferred upon the authority of the *dicta* of the judges in the foregoing case, that the facts amounted to an obtaining of money by false pretences. In the present unsettled state of the law upon the subject of such frauds, it is difficult to say what facts will or will not bring a party within it : it is conceived, however, that very grave doubts may be entertained whether or not the foregoing facts would legally sustain a charge of obtaining money by false pretences.

DOMICILE.—A., a native British subject, died domiciled in Russia, having acquired large property, real and personal, in that country ; he also possessed a considerable sum in the English funds. He left a will in the Russian language, appointing Russian executors, and the will was duly authenticated in Russia. It purports to dispose of all his " moveable and immoveable property ;" there were no words distinctly excluding any portion of the property, nor was there any direct allusion to the property in the English funds. It was held, that the executors were entitled to probate as regarded the property in the English funds.—(*Euchin v. Wylie*, 31 L. T. Rep. 171.)

LIBEL BY A COMPANY.—An action will, it seems, lie against a company for libel, where malice in law may be inferred from the publication itself.—(*Whitefield v. The South-Eastern Railway Company*, 31 L. T. Rep. 113.)

EMBEZZLEMENT.—*Receipt of Money by Servant of an Agent for the Principal.*—The case of *Reg. v. Thorp*, 31 L. T. Rep. 136, turned upon the question of agency upon a charge of embezzlement. The facts were these :—The prisoner was the servant of one Hardy, who was himself an agent for a railway company to carry out goods for such company and receive the money for them, he using his own drays and horses, and being answerable for the money collected. The prisoner was accustomed to go out with such goods, having first received from the company a delivery-book, containing an entry of the articles and the amounts charged for their carriage, accounting directly with the clerks of the company for the money received, and the delivery receipts being made out in the name of the company. The defendant having in this way received money for the carriage of goods, never accounted for it, either to the company or to his master, but absconded. Upon these facts it was contended, on the part of the defendant, that he was not liable to be convicted upon this charge, inasmuch as at the time of the alleged embezzlements he was not the servant of the company, but the servant of Hardy, and that the money he was charged with embezzling was received in the name and on the account of the railway company. The Court, however, held the conviction good. Pollock, C.B., said :—" The indictment is for embezzling money, which it is alleged that the prisoner took into his possession ' for and on account of his master,' and it was proved that the prisoner's master was answerable to the company for the money received by him. But it was also proved that the money was received by the prisoner in the name of the company ; and the doubt which appears to have arisen is, whether the prisoner, having received the money, not in his master's name, but in the name of the company, the conviction can be sustained. We are all

of opinion that the conviction is right. The stat. 7 and 8 Geo. IV., c. 29, s. 47, makes use of the words, 'for or in the name, or on the account of his master.' Now it is clear that, although the prisoner received the money in the name of the company, he received it on account of his master."

HUSBAND AND WIFE—Coercion of Husband.—A wife, at the request of her husband, wrote various letters to a man with whom she had had, previous to her marriage, illicit intercourse, in which she pretended that she had become a widow, in order to induce him to meet her at a certain place. The meeting took place; and the woman having led him to a retired spot, her husband followed them and severely assaulted the man. The jury found both husband and wife guilty; but on a case reserved, the conviction was reversed by the Court, who held that she was a married woman, and that in what she did, she acted under the coercion of her husband. The woman herself had not done personally any act of violence to the man.—(Reg. v. Samuel Smith and Sarah Smith, 31 L. T. Rep. 21.)

FORGERY OF CERTIFICATES OF CHARACTER.—A person who forged certain testimonials of character, and uttered them to a chief constable of police, by means of which he obtained a situation as constable, was convicted of forgery. In a case reserved, the Court (Bramwell, B., dubitante) affirmed the conviction.—(Reg. v. Moab, 31 L. T. Rep. 121.)

DAMAGE—Breach of Contract.—CROWDER, J.—This was a case that was argued before my brothers, Willes and Byles, and myself, the other day; it was on a rule to reduce the damages which had been given for the breach of a contract, and we are of opinion that that rule must be made absolute. It was an action brought to recover damages for the breach of a contract entered into between the defendant and the plaintiff, under which the defendant was to make and furnish a fire-box for the plaintiff, and some time was mentioned. The fire-box was not furnished in the time, and when it was sent to the plaintiff it was utterly useless. The plaintiff had paid the amount that was agreed for it, the sum of L.12; and by this action he sought to recover back the sum he had paid, together with the damages arising to him from the breach of the contract. The jury gave the amount of L.12, and they gave also the further amount of L.8, which the plaintiff was put to in getting a fresh box, and about which there was no dispute. Then they gave a further sum of L.20, as special damages arising from the breach of that contract under the circumstances under which the contract was made; the question was, whether the jury could give that amount. We are of opinion that they could not. It was sought to be recovered in consequence of there having been a contract entered into between the plaintiff and person of the name of Sheaf, to furnish to Sheaf by the plaintiff a threshing machine and a fire-box quite separate from that. As regarded the defendant, he had nothing to do with the contract between Sheaf and the plaintiff; but it was said, that as Sheaf had brought an action against the plaintiff and recovered damages for the breach of that contract, at least the matter had been settled, and damages paid to the amount of L.20, that that was the damage which the plaintiff could recover against the defendant for making and sending an insufficient fire-box. We think this case is entirely governed by the case of Hadley v. Baxendale, to which reference is made, and we think it does not come within that rule by which this sum could be recovered as special damages. It is laid down in that case, "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally," that is, according to the usual course of things from the contract itself, "or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." Now, it is quite clear that this was not the ordinary consequence of breaking the contract. The only question was, whether it came within the second part that the breach of contract was such as that the damage arising may be supposed to be in the contemplation of both

parties at the time they made the contract. We have looked into the note of the learned judge, and cannot find there is any such contract as would lead to the conclusion that it was in the contemplation of the parties that the breach of the contract entered into between the plaintiff and Sheaf, and the damages recovered, could be the probable result of the breach by the defendant of the contract to furnish a fire-box to him. We therefore think that the rule should be made absolute for reducing the damages; that we cannot help thinking in this case, the action being brought to recover back the sum of L.12, it would be a monstrous conclusion to arrive at, that the breach of the contract for not furnishing the fire-box for L.12 did give rise to the additional damage of L.20.—*Rule absolute to reduce the damages.*—(Portman v. Nichol, 31 L. T. Rep. 152.)

ARREST.—A defendant resident abroad, and contracting a debt in England while abroad, was induced to come to England by a trick to which plaintiff was a party, and, immediately on his arrival, was arrested on a *capias* or order of a judge, under 1 and 2 Vict., c. 110, s. 3. It was held to be an abuse of the process of the Court, and he was ordered to be discharged.—(Stein v. Valkenhuyzen, 31 L. T. Rep. 80.)

EVIDENCE.—Hothingham v. Head, 31 L. T. Rep. 85, was an action on a contract for sale of goods. The defence was, that it was a conditional contract. It was proposed by the defence to ask the plaintiff, in cross-examination, whether he had entered with other persons into certain contracts similar to that set up by defendant. It was also proposed to prove by witnesses, on the part of the defendant, that the plaintiff had done so. It was held that it could not be done, and the question could only be asked for the purpose of testing the plaintiff's credibility. Some doubt was expressed, whether the question was right even for this purpose.

CONTRACT.—Where the parties to a contract expressly exclude an appeal to any court of law or equity, it seems that a court of equity will recognise such an arrangement and refuse relief. In Scott v. the Corporation of Liverpool (31 L. T. Rep. 147), the agreement was, "that it should not be competent to either party to except at law or equity" to the settlement of any disputes, which were to be referred to the engineer, whose decision was to be conclusive.

GAMING.—*Wager made and paid at the time.*—In Hill v. Fox (31 L. T. Rep. 118), Pollok, C. B., said :—There can be no doubt that the original statute to prevent gaming was not to prevent gaming altogether—it was to prevent excessive gaming; and it meant to leave a person at perfect liberty to gamble as he pleased with the money he carried about him; that if he made a wager and paid it on the spot, it could not be recovered back—perhaps it could not have been enforced; certainly it cannot be now, because an action cannot be brought for a wager; but if paid at the time, it certainly could not be recovered back; and apparently the object of the statute was this, that people might deal with the money that they had as they pleased, but that they should not be permitted to give notes, bills, bonds, mortgages, and securities, and gamble away their whole estates so as to bring themselves to ruin. As I have observed, the title of the Act is to prevent excessive gaming alone. If a person gave all his money afterwards—and that is what many people do—the transaction is free from that which induced the Court, in Cannon v. Boyce, to prevent a man from recovering money that was given for the purpose of paying a loss upon a stockjobbing transaction, because there the statute against stockjobbing makes the matter wholly illegal. It is illegal to make these bargains; it is not illegal, at least it was not illegal, to make a bet upon a horse-race, provided he paid the bet merely with the money he had about him, and paid it at once; there was no illegality in that whatever. Now, as, therefore, this transaction is free from the objection which induced the Court, in Cannon v. Boyce, to hold that the action was not maintainable, then the question comes really to this, Was the money given really and truly as an actual loan, putting into the hands of the defendant the money, and enabling

to apply it or not to apply it in the event of the wager? The plaintiff said that it was; and there can be no doubt about this, that the money was paid, that the defendant had the money, and certainly might have applied it to the payment of the wager or not, as he thought fit. There was, upon that, no legal obligation, but all he did with the money was to pay the debt. We therefore think the only question the jury had to try was, whether really and truly the money was lent and was delivered, and was in the hands of the defendant with the power of using it either to pay a wager, or for any other purpose, as he thought fit. The jury have adopted that view; my brother is satisfied with the finding. We think, therefore, it ought not to be disturbed, and there will therefore be no rule.

MARRIAGE—*Lex Loci*.—The V. C. Kindersley has affirmed the opinion of Mr. Cresswell, in *Brook v. Brook* (31 L. T. Rep. 92, etc., *sup.*, p. 112), as to the invalidity of a marriage with a deceased wife's sister, contracted by English subjects in Denmark, by the law of which country it is permitted to marry the sister of a deceased wife. In the first place (he said), the prohibition of the law of England was a personal incapacity, which could not be cast off or moved by mere change of place. The French jurists are generally of opinion that the validity of a marriage must be decided according to the law of the place where it is celebrated, but with a clear exception in cases positively prohibited by their own law to their own subjects. The necessity of this exception arises from the obligation on each state to preserve its own institutions entire. Nations are bound duly to respect and recognise each other's laws. Each nation is bound by a much higher duty to enforce obedience to its own municipal laws, as regulating the rights of persons and of property among its own subjects. Therefore it is, that so much weight is given to the law of the country in which the contract is to be performed. As a question on the law of contract, the validity of the contract of marriage, as to the capacity to contract, must depend on the law of the country in which the contract was to have its effect; and that country was England. This is a case in which three circumstances concur, any one of which, according to the jurists, excludes the application of the *lex loci contractus*. It is a case in which the public policy of the law of England prohibits the contract. It is a case in which the law is personal in its nature, and must accompany the persons wherever they go; and it is, moreover, a case in which England was the country with a view to which and in which the marriage contract was to have its permanent effect.

VENDOR AND PURCHASER—*Completion of Purchase—Right of Solicitor to receive Purchase-money*.—In a case, the facts of which are immaterial, the Court of Appeal was called upon to decide whether a purchaser has a right to insist upon having a conveyance attested by a solicitor, or by a witness of his own selection; and whether he has also a right to require that the money shall be paid to the vendor personally. Upon these questions the L. C. said, there is very little in the way of authority to be found; the reason of which is obvious. Sales and purchases are generally conducted with mutual confidence. Each party is anxious for the completion of the transaction, and unwilling therefore to introduce any unnecessary obstacle, and in general no necessity exists for any unusual precautions. Under ordinary circumstances, therefore, the purchaser's solicitor has no hesitation in accepting the conveyance, though he has not witnessed its execution, or in permitting his client to pay the purchase-money to the solicitor of the vendor; but, supposing circumstances should arise in which the purchaser may feel that he ought to be armed with the most complete proof of the transaction, is he entitled to make himself thoroughly secure, both as to the execution of the conveyance and as to the receipt of the purchase-money? It is quite clear, if a purchaser pays his purchase-money to a person not authorised to receive it, he is liable to pay it over again; and it may, I think, be considered as established, that the possession of the executed conveyance with the signed receipt for the consideration money indorsed is not in itself an authority to the solicitor of the vendor to receive the purchase-money.

The difficulty is, to see how the purchaser can be safe at all times from the danger of paying his money to an unauthorised person, without the vendor being present, or having expressly given to the purchaser or his solicitor authority to pay it in a particular manner. The text-books speak of a written authority, but how can the purchaser be sure that it is genuine?—at all events, it may impose upon him a difficulty in the way of proof which he may have a right to object to. It becomes, as it was said in argument, a link in his chain of title which may hereafter embarrass him, and which it may be said the vendor ought not to be permitted to force upon him. On the other hand, many occasions may be suggested in which it would be most unreasonable for the purchaser to require the presence of a vendor, or of several vendors dispersed in various parts of the country, and when he may have been taken to have waived the right of the vendor attending by the conditions of sale, and especially so in a negotiation on behalf of a person who is not resident in this country. If the Court were to lay down a rule that the purchaser, under all circumstances, has this right, it might, in many cases, afford a party a means of escaping from his contract for non-compliance with the requisition on which his title is to rest, which might be a ground for a bill for specific performance. Those are some of the difficulties with which the subject is embarrassed on the one side and on the other, and which make me very unwilling to decide any abstract question with relation to it. It will be sufficient in this case to say, that if a purchaser has not a right in every case to insist upon the vendor being present when the purchase-money is paid, neither is the vendor entitled to refuse a compliance with a request of this description, when circumstances arise which are sufficient to justify it. It is not likely, in ordinary transactions between a vendor and purchaser, that the attendance of the vendor will be vexatiously required; and I think that the purchaser ought to have the right reserved, to be used whenever the proper occasion arises for its exercise. *Turner, L. J.* observed, the soundness of the position as to the right of the solicitor to receive the purchase-money may be tested thus:—Suppose, after the completion of the purchase, and after the purchase-money was paid to the solicitor, the vendor should deny that it has been received by him, and should file a bill in this Court claiming a lien on the estate for the unpaid purchase-money, what defence could the purchaser make? The receipt upon the conveyance would be a defence to him; he could not show that the law authorised the solicitor to receive, and his whole case would depend upon his proving that the solicitor was authorised to receive—a fact which he might have no means of proving. I think, therefore, that the purchaser had the right of insisting, either that the vendor should attend and himself receive the purchase-money, or of requiring that there should be written authority to pay the solicitor. And the vendor not having attended, and no written authority having been produced, I think that he must pay the costs of the suit.—(*Viney v. Chaplin*, 31 L. T. Rep. 142.)

SALE—Undisclosed Principal—Usage of Trade—Evidence.—This was an action for accepting linseed oil alleged to have been bargained and sold by the plaintiff to the defendant. The facts, as stated in the case for judgment, are very clear and simple. The plaintiff had employed Messrs Thomas and Moore, who were London brokers, to sell the oil. A Mr Schenck had employed the defendants, who were also London brokers, to buy oil for him. The dealing in question was between the brokers, without disclosing the names of their principals, and it is quite clear that the two brokers met and agreed upon the sale, as opposed contracting parties. "In order to prove the alleged contract, the plaintiff gave in evidence two notes, of which the following are copies:—'75, Old Broad Street, London, 14th Aug. 1855.—Sold this day for Messrs Thomas and Moore to our principals ten tons linseed oil, of merchantable quality, at L.44 per ton real, tare and usual draft; to be free delivered during the last fourteen days February next, and paid for in money, allowing two and a-half per cent. discount. Dale, Morgan, and Co., brokers. One quarter per cent. brokerage to Dale, Morgan, and Co.' 'London, 14th Aug. 1855.—

old to Dale, Morgan, and Co., for account of Mr Charles Humfrey, ten tons of seed oil, marketable quality, at L.44 per ton real, tare and usual draft; to be delivered within the last fourteen days February next, and paid for in ready money, allowing two and a-half per cent. discount. Thomas and Moore, brokers. One quarter per cent. brokerage to Dale, Morgan, and Co., and a-half per cent. to us." The first note was signed by the defendants and sent by them to Thomas and Moore; the second note was signed by Thomas and Moore, and sent to the plaintiff, and was a copy of an entry signed by them and entered in their broker's book. No copy of this entry was sent by Thomas and Moore to the defendants. The plaintiff gave in evidence that, according to the usage of the particular trade, whenever a broker purchases or sells oil without disclosing the name of his principal, he is himself liable to be looked to as the purchaser or seller as the case may be, and that it was in accordance with the usual practice in such cases that Thomas and Moore did not send the defendants any copy of their entry in their book. The defendants did not disclose their principal until after the oil had been tendered to them by the plaintiff, according to the terms of the contract, and when their principal, Mr Schenck had become insolvent. It was contended at the trial before Coleridge, J., that the plaintiff ought to be nonsuited upon the ground that there was no evidence of the alleged contract to satisfy the Statute of Frauds. The learned judge directed a verdict to be entered for the plaintiff, giving the defendants leave to move to enter a nonsuit. A rule was obtained accordingly, which was afterwards discharged, and the present appeal has been brought. The judgment of the Court of Q.B. reported in 7 Ell. and Bl., p. 268, and is of considerable length. It is quite clear (said Martin B., with whom Willes J. concurred) that the contract in this case was a parol contract. The contract was made by what passed between the brokers, viz., Thomas and Moore and the defendants, and at common law would have been a perfectly good contract. But under the 17th section of the Statute of Frauds, there was here no acceptance or part payment, and to make the contract good there must be a note or memorandum in writing of the bargain signed by the defendants or their agents. Now, in this case there were no brokers, who acted as opposite dealing parties to each other; and there was no privity or connection between the notes signed by them. In truth, they were different contracts. The one states a contract made by the defendants as brokers, to their principal, for Thomas and Moore; the other states a contract made by Thomas and Moore for the defendants to the plaintiff. So also, I think the note signed by Thomas and Moore does not satisfy the statute, and for this reason, that there is no evidence whatever in the case that Thomas and Moore are agents of the defendants; and the statute requires that the note or memorandum, if not signed by the party himself, shall be signed by an agent thereby lawfully authorised. The writing here shows the contrary; it states that the principal was the vendee and the defendants' brokers. To give effect to the usage in order to support the declaration would, therefore, impose upon the defendants the relation of vendees. He therefore held that the evidence was inadmissible, as it varied the contract. The other judges (Cockburn C. J. and Williams and Crowder J.J.) held that, as regards the first of these objections, the evidence was offered not to vary but simply to explain the terms of the contract, it was admissible on the principle on which evidence of the usage of particular trades has in so many instances been admissible. The judgment of the Q.B. was affirmed.—(*Humphrey v. Dall and Another*, 31 L. T. Rep. 328.)

PROMISSORY-NOTE.—Form.—A promissory-note in this form, "I promise to pay as *per memorandum of agreement*." The words in italics do not destroy the negotiability; they merely mean, as "I had agreed to do." At least, it lies on the defendant to show that they relate to an agreement that the note was not payable absolutely.—(*Jury v. Barker*, 31 L. T. Rep. 177.)

Joint and Several.—A joint and several promissory-note made by A. B. and C. was made payable to B., one of the makers, and another. To an action by the payee against A., it was pleaded that they could not recover on the

note, one of them being a maker. Plea overruled—"As soon as a party chooses to sue one of these parties, as on a several note, he cannot treat it as a joint note afterwards; and in that case it is the same as if there had been three separate instruments."—(*Beecham v. Smith*, 31 L. T. Rep. 176.)

MERCHANT SHIPPING.—The master of a foreign brig, lying in an English port, was thrown into gaol for meat supplied to the ship. B. paid the account, taking a bill of exchange from the master on his owners, which was dishonoured. B. then arrested the brig on a suit for necessaries. It was held that he could not recover the money so paid; the Court could do no more than pronounce for money advanced in order to procure necessaries then wanting.—(*Re Gosfabrick*, 31 L. T. Rep. 345.) B., master and sole owner of a ship, gave a bottomry bond on ship and freight, and afterwards navigated her as master. She was arrested and sold at the suit of the bondholder. B. claimed his wages as master in priority to the bondholder's right. It was held that B., having pledged his personal credit, as well as hypothecated the ship, could not assert a claim for wages to the prejudice of the bondholder, his creditor.—("The William," 31 L. T. Rep. 345.)

ARBITRATION—*Lands Clauses Consolidation Act.*—The defendants were a water company, in whose private Act the Land Clauses Consolidation Act was incorporated; the plaintiff was a millowner, who had sustained injury from the abstraction of water by the defendant. No offer of compensation was made by the company, but both parties agreed that two persons, A. and B., should appoint a third person (C.) to ascertain and settle the amount of compensation. It was held that this was not a compulsory arbitration under the Act, and that the plaintiff was entitled to the costs.—(*Martin v. Leicester Waterworks Company*, 31 L. T. Rep. 265.)

NEGLIGENCE.—The person who works one of the Mersey ferries, chartered as steamer of the defendants on a special occasion, to cross and recross with all persons whom he should present for ferryage. Plaintiff was injured by the manner in which the steamer was worked; and having brought an action against the owners of the steamer (not the ferrymen), the jury found there was negligence, and awarded L.600 damages. Leave being given to defendants to move that the verdict be entered for them, etc., and a rule obtained—the Court discharged the rule. Hill, J.—The first question is, Whether the servants in charge of the steamer were the servants of the defendants. It is quite clear from the authorities, beginning with *Laugher v. Pointer*, which was followed by *Quarman v. Burnett*, and other cases, that these servants were the servants of the defendants. It was in the power of the defendants to have changed them, if they pleased, during the day, and also to have altered the tackle in the vessel. Therefore on that point there ought to be judgment for the plaintiff. Then the next question is, Whether the contract with *Hetherington*, by which the plaintiff was a passenger, disentitled him from recovering for the defendants' negligence. To me it appears wholly immaterial that the plaintiff was a passenger. If he had been standing on the landing pier, and had been injured by the defendants' negligence, he would have been entitled to recover damages from them. Therefore the allegation in the declaration, that the plaintiff was a passenger on board for hire, does not further, nor does it hurt, the plaintiff's case in the slightest degree. Then the third point is as to the duty alleged in the declaration. That allegation must be read as observed by my brother Erle, in connection with the other allegations in the declaration; and its meaning then is, that it was the duty of the defendants not to use the vessel so as to put the persons of the Queen's subjects in danger. Therefore I think this rule ought to be discharged.—(*Dalyell v. Tyrer*, 31 L. T. Rep. 214.)

PRINCIPAL AND SURETY.—A surety for the good conduct of his principal in an office which then was annual, is discharged if that office is changed from being annual to one held during pleasure.—(*The Mayor, etc. of Cambridge v. Dennis*, 31 L. T. Rep. 199.)

THE

JOURNAL OF JURISPRUDENCE.

JUDGES AND SECRET JUSTICE.

WE fear that the legislation applicable to Scotland is retrograding. The great object of Courts of Justice should be to administer the law not merely in the cheapest, but also in the simplest and least technical way. The education of the people will never be completed so long as they are utterly ignorant of the laws under which they live, and with which they can never become acquainted so long as these laws are wrapped up in technical professional jargon. But the improvement of legal phraseology is not the theme upon which we wish to offer a few words at present. That may constitute the subject of another article at a future day, with Jeremy Bentham for our guide. At present, we have to deal with an evil more clamant and more pressing, but more remediable.

We have had a number of admirable statutes during the last decade; and this Journal has not failed to do justice to the men who devised them, and by whose energy they were carried through. But they are all more or less pervaded by one great blot, constituting a running sore which festers, and irritates the body politic. By its influence, less practical good has been obtained from these statutes than might have been reasonably hoped for. The evil is traceable to the impulse given to the legislative mind by popular clamour, generated by popular ignorance. We refer to the mania or furor in these latter days for giving irresponsible and unreviewable jurisdiction to judges,—constituting courts which discharge their duties in secrecy, and out of the light of day,—and handing over little bits of business to particular judges, when every other judge was as fit for the work as the one selected. The evil began with the Reform Bill itself. That measure called into existence a set of courts whose trying judgments are discreditable to the law, which has hitherto aimed to be one of the exact sciences. At or about this season of

the year, the newspapers teem with notices that the Registration Appeal Court at A, by a majority of 2 to 1, were graciously pleased to admit Free Church ministers to be electors, while the Registration Court of B unanimously rejected them, and the Registration Court of C took some middle course, which is, in the newspaper report, utterly beyond all human comprehension. And then, too, the judgments in the same Appeal Court are no longer binding than during the period when the same men sit as judges. If one dies, or gets promotion, or retires upon his pension (so well deserved and earned by hard labour), the whole questions started at these Appeal Courts are opened up of new; and the circle of argument is again run round, and the newspapers at the dull season of the year are delighted to have the decisions even of the Registration Courts to report. Of course, all this distressing and expensive litigation would have been saved, if there had been a Court of Appeal to control the honest error or conceited opinionativeness of subordinate tribunals. But we suppose it was thought *cheaper* to have no appeal to a central court, as exists in England; and the consequence has been, that, since the year of the Reform Bill, thousands of pounds have been wasted in arguing and re-arguing the same points, which might have been all settled by one judgment of a Court of Appeal in the year 1831. In any new Reform Bill that may be passed for Scotland, it is hoped that this crying grievance will not pass without a remedy.

Akin to this subject, there is another, which appears to have occupied the attention of the body called the Chamber of Commerce in Edinburgh, which, for all we know, may be composed of very excellent men; but they must talk sense before they are considered an authority. It appears that, at a recent meeting of this body, a Mr J. Mitchell and Mr Duncan M'Laren made speeches, to the effect that it would be highly desirable to extend the small debt jurisdiction of the sheriffs to cases where the sum at stake amounted to £50. Of Mr Mitchell we know nothing; but, of course, all the world knows the antecedents of Mr M'Laren. It is the misfortune of men, always in search, for party purposes, of a popular delusion or a popular cry, that their motives are sometimes misunderstood, and sometimes misinterpreted. Mr M'Laren is an intelligent man; but has he or Mr Mitchell ever been in a Small Debt Court? Have they seen at any time the manner in which the work is done? We blame no man, or set of men; we quarrel with the system; and therefore we beg our friends who preside in these places to moderate their wrath, when we simply declare that the conditions to the proper administration of justice are wanting in these tribunals. In the first place, all professional assistance is strictly precluded by statute; and any party incapable of stating his case in coherent language, is of course at a great disadvantage with a confident and fluent opponent. Then, too, fifty,—one hundred,—two hundred,—three hundred cases are disposed of in a day!—a case every three minutes!—and as the worthy judge washes his hands at the conclusion of his day's labour.

he boasts of the number of cases he has gone through, as the sportsman would do of the grouse he has bagged.

Now, L.50 is to a poor man as much (shall we say ?) as L.500 is to Mr Duncan M'Laren. It is a small fortune. It would be a grand tocher for a daughter, and set a son up in business. And we now put to this excellent gentleman the question, What would be the extent of his fiery indignation if there were issued against him, after a discussion of three minutes, a decree for L.500,—unreviewable, however erroneous,—however hasty the circumstances under which it was delivered, and however much the balance was inclined against him, from defect of temper in the judge, provoked by the opinionativeness, obstinacy, and persistency with which the case was maintained ?

The great curse of the legislation of our times, is the calling into existence irresponsible judges. It is a frightful power to give to any man ; and all who have seen poor, miserable human nature tempted with it, can come to no other conclusion than that it is the worst of all oppression, because it is oppression in the name of law. The *existence* of the right to appeal is the thing essential ; and the fallacy of all the opposite reasoning on the subject arises from assuming it as a fact, that in all these petty cases *there are appeals*. So far from this being the case, it is the fact that, out of 15,000 cases between L.12 and L.25, which formerly could have been appealed to the Circuit Courts, there were only 17 carried there, on an average, yearly. But the fact that there was the right to appeal, secured, in the other 14,983 cases, patience and decorum in the hearing ; and of course the judgments gave corresponding satisfaction to the parties.

It is also desirable that Mr Duncan M'Laren and Mr J. Mitchell should not be allowed to thrust upon the public such gross inaccuracies as fill their speeches in reference to processes in the Sheriff Court, in the ordinary roll. It is a misrepresentation without excuse, to complain of the length or of the delays in these proceedings. The record is now cut down to a brevity which, in our opinion, is inconsistent with a proper record. The proof is taken by the judge himself ; and, if parties are ready, upon the conclusion of the proof, they may get the judgment at once. Now, we venture to say, that we have had more experience of the working of the County Courts Act in England than ever Mr M'Laren or Mr Mitchell had ; and this we state as matter of fact, that the account of an attorney, in a contested case before a County Court in England, exceeds the account of a procurator in an ordinary action before the Sheriff Courts in Scotland.

The County Courts of England have, in the main, given satisfaction, because they were a relief from a great and insupportable burden. The English people had no local courts like ours, in which they could recover moderate debts. In all cases they required to resort to the Supreme Courts, in which the expense is so great as justly to constitute a scandal against the English law. If they had the Sheriff Courts which we possess, there never would have been

an outcry for any others; and it is in forgetting this circumstance that persons like the members of this Edinburgh Chamber of Commerce arrive at wrong conclusions, by reasoning upon half information. The Scotch summons in the Sheriff Court is shorter than the English plaint. It never is so expensive; the court fees, and the attorney's fees, upon an English plaint, being as large as would pay for a summons in the Court of Session. The defence in a Scotch ordinary Sheriff Court process is now only generally about eight lines, jotted down by the sheriff. The defence in an English plaint is stated in open court by the counsel or attorney for the defendant, and is either jotted down or not by the judge, as he pleases. The proof, in both cases, is taken by the judge, with this difference, that the Scotch judge *must* take notes of the proof, while the English judge need not do so unless he please. An appeal is given upon questions of law under the English County Court Acts; an appeal is given both on the law and on the facts from the judgment of the Scotch Sheriffs. Therefore, when the matter is analysed, it all comes to that one point, of an appeal existing to the Supreme Courts of Scotland on the *merits*. Whether or not this is an evil must be solved by ascertaining whether the right of appeal has been abused. On this point it is difficult to obtain information; but we think we are within the mark when we say, that there are not fifty advocations in one year from all the courts in Scotland in regard to sums under L.50; and of these fifty, a large portion are composed of filiation cases, where *character* as well as *money* is at stake. Now, if the allowing these fifty cases to come into the Court of Session will keep the numerous local judges to their duty,—will insure patience,—stimulate attention,—and promote sobriety of thought, it would be the most insane weakness to yield to the clamours of half-informed and conceited agitators, who never had any practical experience of the working of the one system or the other, but who have at hand an abundance of the easy loquacity which appeals to the lowest prejudices.

We are indebted to another newspaper for calling attention to a different subject, and one of more practical and immediate interest. One of the most important Acts passed in recent days was the Valuation of Lands (Scotland) Act, 17 and 18 Victoria, cap. 91. Our readers are no doubt aware of the general object of this Act. Its purpose was to put an end to the uncertainties and the expense arising from discordant valuations made by different assessors, for the purposes of local assessment, registration of electors, and general taxation. It provided that the Commissioners of Supply in every county, and the magistrates in every burgh, should make up a valuation roll annually of the yearly rent or value of the whole lands and heritages within the county or burgh. The commissioners and magistrates were authorised to appoint assessors to ascertain and assess the value of the lands, and machinery is provided for the purpose of carrying out the valuation. The valuation, when made, is

to be the foundation of assessments, and to be adopted as evidence in all questions relating to the franchise. If any party be dissatisfied with the valuation of the assessor, he is allowed to appeal to a court composed of the Commissioners of Supply and magistrates of the burgh, which is held annually; and then comes the favourite clause in these well-worn words:—

“And the deliverances of such Commissioners and Magistrates respectively, upon such appeals and complaints, shall be final and conclusive, and not subject to review.”

The nature of the questions which may be raised under this statute, may be judged of by the Report of the Proceedings of the Commissioners of Supply for the Stewartry of Kirkcudbright, which we print in an appendix. It will there be seen that the questions raised embrace the most difficult and subtle questions of technical law; and yet this jurisdiction is handed over to a body of country gentlemen and a number of burgh magistrates, not one of whom may have ever opened a law book. And these men are allowed practically to tax, and to relieve from taxes, the whole property in the country. They have in their hands a jurisdiction as extensive as that of the Court of Session itself. They deal with thousands of pounds. They may lay an annual burden upon a man's property equal to the interest of a heavy loan, and there is no relief. Surely this could not have been intended; or, if intended, it cannot be allowed to continue a moment longer than is required for its repeal.

The Government apparently soon became dissatisfied with this jurisdiction, so far as regarded general taxation; for, by a subsequent statute, it provided relief for itself in reference to matters appertaining to the Inland Revenue. Whenever a question arises between the assessor for the Inland Revenue and a proprietor of lands and heritages, either party is entitled to demand from the commissioners or magistrates an adjusted case, and such case is ordered to be transmitted “to the Commissioners of Inland Revenue, to the end that the same may be submitted to the Senior Lord Ordinary, and the Lord Ordinary officiating in Exchequer Causes in the Court of Session, for their opinion thereon; and such judges to whom such case may be submitted, shall, with all convenient speed, give and subscribe their opinion thereon, and according to such opinion the valuation or assessment which shall have been the cause of the appeal shall be altered or conformed.”—(20 and 21 Vict., cap. 58, sec. 2.)

This provision suggests very grave reflections. It, of course, was promoted by the Government, who found it necessary to provide a remedy against the uncertain and varying judgments of country gentlemen and provincial shopkeepers. But if that was necessary, so far as regarded Government taxation, surely it was equally essential for the protection of private individuals against unjust valuations and local assessments. It would have been a wiser and better part for the Government, when it was legislating upon such subjects, to take an imperial view of the question, and obtain an Act for the

benefit of the whole community, and not one merely for the purpose of extorting a larger revenue for the State. We have thus the anomaly, that the opinion of the Supreme Judges may be obtained when the question is one with the assessor for the Inland Revenue, but that you can obtain no such opinion when you quarrel with the assessor who values your land for local purposes.

When we advance a step further, we are met with other anomalies. There was a POWER having an influence as great even as the department of Inland Revenue. There was another INTEREST which had representatives in Parliament capable of making itself heard. Our legislators had shares in canals and railways, and they had little confidence in their agricultural brethren, the landed gentlemen of the counties, or in their staunch supporters, the magistrates of burghs. And, accordingly, they demanded and obtained the privilege of appeal. In all questions relating to railways and canals, it is provided, by the 24th and 25th sections of the Valuation of Land (Scotland) Act, 1854, that there shall "be an appeal from the assessor's valuation to the Lord Ordinary officiating on the Bills in the Court of Session, or where the lands and heritages belonging to such company are all situated within one county, then to the sheriff of such county." Thus it happens that the Senior Lord Ordinary and the Lord Ordinary in Exchequer Causes may be sitting in the dining-room of the former, in one street of Edinburgh, hearing appeals under this Act; and the Lord Ordinary on the Bills is sitting in another dining-room, in another street, in the discharge of the same duty.

We have seen the proceedings before the latter functionary, and have had painful experience thereof. He is authorised to hear the cases "either at Court or at chambers," and he has always preferred the latter. The hearing is at half-past ten, and the *dramatis personæ* are as follow, viz.—Mr A., counsel for the assessor; Mr B., counsel for the Railway or Canal Company; Messrs C. D. and E., counsel for several parishes. Then follow four Edinburgh agents, five agents from Glasgow, and nine Poor Law inspectors. The whole chairs in the library and dining-room of the honourable and learned judge were exhausted before the writer hereof entered: and he was obliged to content himself with a seat composed of the third volume of Bayle's Dictionary, the Corpus Juris Civilis, and Grotius on Peace and War (translated).

The debate was begun by Mr C., who, with his usual clearness and circumlocution, explained the case for the parish which he represented, occupying the time of his Lordship till two o'clock. The counsel for the next parish (concurring generally with his learned friend) had various specialties to enlarge upon, which he was detailing with his usual eloquence at three o'clock, when he was interrupted by his Lordship, who intimated that the Bill Chamber clerk was in attendance with five petitions for sequestration, and three notes of suspension and interdict where caveats had been lodged.

These, he regretted to say, would occupy his time till five o'clock ; and as his period of the Bills expired at 12 P.M. on that evening, he stated his willingness to resume the discussion at seven precisely. This did not seem consonant to the prevalent feeling. The parties would on no account put his Lordship to the inconvenience of an evening sederunt,—the truth being, that three of the counsel had dinner engagements, and two of the Glasgow agents required to meet important clients in the evening.

In these circumstances, it became absolutely necessary to hand the matter over to the succeeding Lord Ordinary on the Bills. But, in order that the discussion might not be lost, it was arranged that he present Lord Ordinary should attend, and give the benefit of his valuable assistance to his successor on the following day.

The scene changes to a different street and a different dining-room. Agents, counsel, and inspectors as before (with the exception of two inspectors, who were obliged to return home in consequence of an irruption of Irish paupers, who threatened to exhaust the whole funds of their parishes, and whom it was necessary to look after). The former Lord Ordinary, in terms of the arrangement, has to give an account to his successor of the preceding discussion ; and an irreverent poor-law inspector, while this is being done in a different room, thus sketches it :—

The past Lord Ordinary.—"There has been a most weary discussion about nothing in this case. I see that Counsel A. and B. have got notes, extending to nine pages each ; and the result will be, that unless they are shut up, the discussion will continue for weeks. Preliminary objections without end were taken ; but the only point in which I have any difficulty is, as to whether the superficial area of the reservoirs is to be divided according to the aliquot proportions of the feeders of the canal, or whether it is to be taken according to the circumference of its lineal measurement. All the rest of the points raised are rubbish."

The scene changes to the dining-room ; and Mr Counsel C. "has the honour to attend on behalf of a particular parish ; and in the outset of this important argument, he thinks it right, as Lord X. was not present at the former discussion, to recapitulate, as shortly as possible, the facts of the case." "In the year 1647 a charter was granted by——"

Lord X.—"I do not think it is necessary that counsel should resume the very able and ingenious argument stated at the former discussion. We have carefully considered that argument, and the only point on which we desire further information is, Whether the superficial area," etc., etc., etc.

And then the counsel all fall upon the superficial area ; and, after an hour's wrangling over the dining-room table, their Lordships admit that it is a point of difficulty, and take it to *avizandum* ; and in ten minutes or ten days after the talk, they send forth an interdictor in favour of the assessor, or the Canal Company, or the

parishes, without any reasons for the judgment; and, accordingly, the judgment falls flat and still-born, and is heard of no more!

Is this battledore and shuttle-cock a proceeding in a court of law? Why should I be obliged to sit for hours upon Bayle's Dictionary, in a corner of that dining-room, listening to a wrangle over a dining-room table? Why should that honourable judge not be obliged to sit in open court, with his gown and wig on, while I am accommodated in my proper seat with comfortable quarters? Do I charge my client one farthing less because I am put to all this inconvenience? and do you think that the public are benefited, or the great purposes of law and justice promoted, by allowing judges to pronounce decisions in this style, and which, unaccompanied by the grounds of judgment, can have no weight, and have in reality no weight, with the country?

It has always been the practice to allow counsel to be heard before the Lord Ordinary on the Bills. It has now been decided that counsel are also entitled to be heard upon an adjusted case before the Senior Lord Ordinary and the Ordinary in Exchequer Causes. In these circumstances, why should not the cases be heard in open court, so that they may be reported, and the judgments be precedents for all time? and why should there be diversities of jurisdiction in the matter of appeal? Suppose the *Senior* Lord Ordinary is the Lord Ordinary on the Bills at the same time, what is he to do? Shall he attend to the Canal Company's cases or the Inland Revenue cases first? Then why should it be the *Senior* Lord Ordinary and the Lord Ordinary in Exchequer who should be selected for the Inland Revenue cases? What is the use of a Lord Ordinary in Exchequer? Why fix upon particular judges, and parcel out the business of the country to particular men in this way, when all judges are equally fitted for the business? If the *Senior* Lord Ordinary, and the Lord Ordinary in Exchequer Causes, be spending their vacation at Rome, is there any good reason why the business of the country should wait their return? Could not the jurisdiction have been conferred simply upon any two of the judges of the Court of Session, or upon that over-worked and over-burdened man, the Lord Ordinary on the Bills, who is always in Edinburgh, and to whom the appeal is given in matters relating to railways and canals?

We call upon the Dean of Faculty, as the head of the bar in Scotland, to do justice to himself and to his work,—to bring order out of this chaos, and to reconcile these discordant jurisdictions. There has not been, during this century, a more important statute passed than the Valuation Act; and surely it is one entitled to the benefit of a Central Court of Appeal, sitting with all the formalities of a court of justice, and not subjecting parties in back-rooms and dining-rooms of the houses of Lords Ordinaries to some of the miseries of the Black Hole of Calcutta. The decisions, moreover, should be reported, and accompanied with reasons, so that a code

of valuation law be built up ; and an end should be put to the constant change in the judges, which leads to uncertainty and vacillation in the law. Then, too, the judgment of the sheriff should no longer be declared final in reference to canals and railways. Surely, when an appeal from sheriffs is allowed in any matter of the value of twenty-five pounds and one shilling, there is no reason why it should be debarred in cases which involve a value that would buy up half a county. We have due respect for the sheriffs and their substitutes, but we do not recognise absolute wisdom in either ; and we desiderate the privilege of an appeal to a court of greater experience and greater learning. Whether it should be to a Division of the Court of Session, or to two fixed judges of that Court, is a matter utterly immaterial ; but that something is necessary in the way of improvement, no man who has had to carry out these statutes into practice will deny.

In the meantime, and until such remedial statute is passed, we must appeal to the judges to give effect to the prevailing opinion among the profession. They have it in their power to do two things : *first*, to sit in open court ; and in the *second* place, to deliver their opinions. Let them also publish the days of hearing, that the reporters may be present. Had we known of the discussion before Lords Benholme and Ardmillan, our reporter would have attended a debate in which one important matter seems to have been determined, and in regard to which a report by a professional man should be preserved.

The point raised was, Whether woodlands, from which no return is derived, ought to be valued ? and the question turned upon the construction to be put upon the 6th and 42d sections of the Valuation Act, which are in the following terms :—

“ § 6. In estimating the yearly value of lands and heritages under this Act, the same shall be taken to be the rent at which one year with another such lands and heritages might, in their actual state, be reasonably expected to let from year to year ; and where such lands and heritages consist of woods, copse, or underwood, the yearly value of the same shall be taken to be the rent at which such lands and heritages might, in their natural state, be reasonably expected to let, from year to year, as pasture or grazing lands.”

§ 42 (which is the interpretation clause), runs thus : “ The expression, *lands and heritages*, shall extend to and include woods, copse, and underwood, *from which revenue is actually derived*.”

Now, reconcile those two sections if you can.

Mr Dunlop, as M.P., has more than once sought to repeal the limiting words of the 42d section, and so render wood liable, according to its real value, not in the year merely in which revenue is derived, but every year ; and he was defeated in this by the landed interest in the House of Commons. He has now, however, attained his purpose by a *judgment* against himself as proprietor of Corsock.

Mr Dunlop, as proprietor of Corsock, contended, *first*, that when woods are valued, they must only be valued as pasture or grazing lands. But *secondly*, they can only be valued as such in the year when they yield revenue, whether that be by cutting the wood or by letting the ground out as grazing.

The commissioners so determined; but the judges have reversed their decision, and have held that woods must be valued every year. We rejoice at this decision, because a plainer piece of class legislation was never perpetrated than by the landed proprietors in the Legislature, in endeavouring to exempt woods from assessment, and then in attempting to get them assessed simply as natural grazings. The judges have held that woods must be valued *every year, whether they return revenue or not*. Gratified at the result of this decision, we are not too curious to inquire as to the reasons of it; yet it would have been highly satisfactory if one's judgment could be convinced as thoroughly as one's sense of justice is satisfied. Lord Benholme alone appears to have expressed an opinion. We have no doubt that, as usual, he spoke good sense; but if so, the report we have of what he said, does not do him justice. There must assuredly have been more satisfactory reasons for the judgment; and our regret at not being able to report them, induces us, in closing this article, simply to say, that we hope we have heard for the last time of debates "in chambers," *i.e.*, the aforesaid dining-rooms; and also of the weary, dreary clause of recent statutes,—"*And the said deliverance shall be final and conclusive for evermore! and shall not be subject to review by reduction, suspension, cassation, declarator, furthcoming, or in any other mode or way whatsoever, and shall not be attacked or assailed otherwise than by grumbling, discontent, irritation, blasphemy, and profane swearing, which are hereby freely allowed.*"

COSTS IN PROSECUTIONS FOR PENALTIES.

WE have more than once urged on public attention the necessity of a rigid control over local magistracy and police jurisdictions. Several recent cases have illustrated how apt man, "dressed in a little brief authority," is to commit acts which are said to cause superior beings to mourn in sympathy with the oppressed. As well remarked by Lord Ivory, in a recent case, "It would be well if in police, not less than in higher judicatures, magistrates would seriously ponder, and carry with them to the judgment-seat, that golden maxim of our late venerable and excellent Lord Justice-Clerk (Boyle), that '*there is no short-hand way of administering criminal justice.*' Not that every little flaw or informality is to be scanned with a hypercritical nicety, or that possibly, in the multitude of police offences, it may not even be necessary for the protection of society and good order that

there shall be comparatively a greater rapidity of procedure and roughness of machinery; but at least, in the straining after a more than ordinary measure either of despatch or repression, *the principles of substantial justice ought never to be lost sight of*. Nor should any laxity or irregularity of practice receive countenance, the operation or tendency of which is to deprive the helpless accused of *a single security which is essential towards the ends of a fair trial*."—27th Feb. 1858, Gray.

If the process of review and correction is to exercise a beneficial and constant control on local tribunals, there must be cheap and expeditious access to the Court of appeal. At present, there appears no well understood table of court fees in suspensions in the Justiciary Courts, the amount of which prevents any but those who have ample means from seeking redress from injustice.

It is worthy of consideration whether the exaction of any official fees in the Court of the Justices or Justiciary Court is legal, in the face of the Act 9 Geo. IV., c. 29, sec. 23 (1828), which enacts, "that no fees or expenses of any description shall be exigible by the clerks or other officers of a criminal court from any person on whom a criminal libel shall have been served, unless the same shall form part of the sentence of the Court." Every conviction which is subject to review of the Court of Justiciary must of necessity be *criminal* in its nature, and the information or complaint must be "*a criminal libel*."

Another dissuasive against seeking for a correction of the iniquities of police convictions, may be found in the recently adopted practice of the Court, that, whilst quashing sentences as grossly informal, of officials, or private parties, who obtained and defended to the last these illegal convictions, are liberated from all liability for the necessary consequences. The party found in the right is made to bear his whole expenses in establishing his right. It is now almost a general rule in the Civil Court to award expenses against the party who is unsuccessful in the end, though supported by the judgment of a sheriff and his substitute. There exists no reason why a similar rule should not prevail in the Criminal Court; the more especially that, in some of these cases, the prosecutor is a public informer, whose object is pecuniary gain; and in others, some official, over-desirous to establish his character for energy in discharge of what he supposes to be duty.

In many of the cases on record, the party complaining to the Supreme Criminal Court has already borne the punishment unjustly imposed; and therefore it would have been better for him to have submitted to injustice without complaint, than to pay in addition the expenses of quashing a conviction, the penalty of which he has already suffered. He has, doubtless, vindicated public justice, exposed the iniquities of the system, and settled a point in criminal procedure for the benefit of the future. All this, however, he has purchased with his own proper means. Such a rule of judgment is encouraging to rashness of procedure in the local magistracy, and discouraging

ing to parties seeking protection from oppression. To show that these remarks are not without foundation, the following recent cases are cited from one volume of Irvine's Reports :—

In a suspension from a conviction of justices, who had absurdly sentenced a man "to imprisonment for a period *not exceeding three months*," the conviction was *unanimously* set aside, the Lord Justice-Clerk designating "*the sentence as unquestionably absurd*;" yet the poor man was allowed his costs only by a majority of three judges to two.—3d Dec. 1855, Grant, 2 Irvine, 277.

A conviction against an apprentice by justices was *unanimously* set aside; Lord Cowan observing, that "it would be *dangerous* to hold that this conviction can be sustained, when it does not set forth the charge against this individual." Nevertheless, the successful party was refused his expenses; though on the same day a suspension of another conviction of the same kind was refused, with expenses against the complainer.—24th Nov. 1856, M'Innes, 2 Irvine, 548.

A police conviction was set aside, because "that delay ought to have been granted, and that *it was a miscarriage of justice not to grant it*;" but no expenses were given to the successful parties.—21st Dec. 1857, O'Brien and Others, 2 Irvine, 603.

A conviction under the Day Poaching Act was *unanimously* set aside, because the accused person was cited to a day different than the day of the conviction; and, as observed by Lord Ardmillan, "*there is here no service at all, and so the suspender was misled*." Nevertheless, he was also refused his expenses.—4th March 1857, Waddell, 2 Irvine, 611.

It is to be hoped that the Court will return to their former practice, of awarding costs in every case of quashing erroneous and unjust convictions. Where there are grounds for refusing expenses, we would incline to hold there existed no sufficient reasons of suspension. The rule of judgment ought ever to be that indignantly announced by Lord Ardmillan in the case of Gray, before cited :— "I do not affect to disguise that on such a proceeding I look with astonishment and indignation; and I think we should do what we can to prevent the recurrence of such a case, by quashing, as contrary to law and justice, the conviction now brought under suspension."

The subject, however, on which we more especially at present direct public attention, is the unlimited power assumed by magistrates, acting under local statutes, to award expenses in addition to the penalty. Acts of Parliament give authority for certain limited penalties. In some statutes, the penalty has a *maximum*, "*not exceeding*" a certain sum named; in other Acts there is both a *maximum* and *minimum*, "*not more or less*" than certain specified sums. In a third series, there is only one sum mentioned, and in which case, contrary to the previous understanding and practice that the sum stated was the *maximum*, the Court have recently held

that the magistrate has no power of mitigation.—3d June 1854, *Whatman*, 1 *Irvine*, 483.

Under some Game statutes, where the penalty is L.5, with three months' imprisonment, for every bird illegally caught, the accumulated sums of money and terms of imprisonment may swell up to thousands of pounds and a lifetime of incarceration. In the case of *Whatman*, cited above, had the prosecutor not restricted his complaint (which he was nowise bound to do), the conviction of the justices would have been for L.220 of penalties, or seven years and four months of imprisonment, failing payment in ten days, all for one act of having in possession forty-four birds in close time.

Whilst in every statute, in some such mode, the power of the magistrate is restricted as to the exaction of penalties, the award of expenses is left very indefinite, and much without control. The phraseology of various statutes is very different in this respect, though perhaps the same power may be meant in them all. Where there exists no provision for costs, it is clear that none can be awarded, and that the penalty must be held to cover all such.—1775 *Wilson*, for. 16,433; 1775, *Macadam*, Mor. 8,676. In England, justices are now regulated by the Act 18 Geo. II., c. 19, in their awards of expenses under statutes which have no special provision on that head. By this statute, where the penalty exceeds L.5, the costs are to be deducted therefrom, and never to exceed one-fifth of the penalty. Before the above cited Act, justices in England had no power to award costs unless authorised by the special statute.

The following may be given as examples of this variance in the statutory provision as to costs:—

The Bread Act, 6 and 7 William IV., c. 37 (1836), sec. 17, authorises the levy of the penalties awarded, "together with the costs attending the *information and conviction*."

By the Coal Mines Act, 5 and 6 Vict., c. 99 (1842), sec. 17, the penalties are authorised to be recovered from effects, "*with the costs and charges attending the recovery thereof*," thus appearing to omit the costs of "*information and conviction*." But the very next section (18th) adopts another phrase, authorising imprisonment for penalties, "*together with costs*;" and the imprisonment to terminate "on payment of the amount of penalty *and costs*." On an appeal to Quarter Sessions, the 21st section of the Act orders caution to be bound, "to abide the judgment of the Court thereupon, and to pay such costs as shall be by the Court awarded."

In the Embezzlement Act, 17 Geo. III., c. 56, the penalties are made recoverable from the effects of the offender, rendering the surplus, "*after charges of the distress and sale deducted*."

By the Factory Act, 7 Vict., c. 15, sec. 45, justices are authorised to award penalties, "*and also the reasonable costs and charges of such conviction, distress, and sale*."

The Trout Fishing Act, 8 and 9 Vict., c. 26, authorises penalties, "*and the expenses attending the conviction*."

The Day (Game) Trespass Act, 2 and 3 William IV., c. 68 (Duke of Buccleuch's Act), provides for one kind of offence a penalty not exceeding L.2, "*together with the costs of conviction;*" and the same section (the 1st) imposes for another aggravated offence an increased penalty, not exceeding L.5, "*together with the expense of process;*" and a third penalty is provided by the following section, "*together with the expense of process.*" In the English statute, of which the Scotch Act is nearly an exact transcript, the corresponding words are, "*costs of conviction.*" By the 6th and 10th sections of the same Act there are other penalties provided for a separate offence, without any mention of costs in addition; and in the general clause for recovery of penalties (section 8th) the words are, "*together with expenses,*" and the form of conviction has the words, "*expenses of process.*"

The General Turnpike Act, 1 and 2 William IV., c. 43 (1831). has the general word "*expenses*" added to the various penalties provided for the numerous offences under that Act.

In the Publicans Acts, 9 Geo. IV., c. 58, and 16 and 17 Vict., c. 67. the penalties are accompanied with the words, "*expenses of conviction to be ascertained upon conviction.*" There is appended a table of fees to be exacted, "*and no others to be payable to the clerks under this Act.*" The first item in this table, of "*complaint, 2s.,*" clearly implies that the clerk is to give out the complaint in the same manner as is done in Small Debt Courts, and so precludes the charge of agency "*drawing the complaint,*" which it is understood has been allowed in some courts of Justices.

The Salmon Fishing statutes, 9 Geo. IV., c. 39, sec. 9, authorises recovery of the various penalties "*and expenses decerned for.*"

In the Registration Act, 17 and 18 Vict., c. 80, the prosecutions can only be at the instance of the fiscal, and a general provision is made for "*expenses.*" These expenses, when not recovered from the party, are payable by Exchequer, under a Treasury minute.

Other references might be made to statutes, but the preceding are those most in observance in Scotland, and are sufficient to show how varied is the phraseology as to awarding costs in public statutes.

When the prosecutions may be at the instance of any person who prosecutes for the same, it would appear that the information to the magistrate may be oral, and, in some instances, the information must be on oath; and thereon the clerk should issue the warrant on payment of his fee, as regulated by the table in the statute, or by the general table of clerk's fees, as fixed by statute or custom. Unfortunately, in Scotland there is no general table of clerk's fees in the Court of the Justices; and accordingly there is a very great diversity of exaction throughout the different counties of Scotland. Any additional expenses the private prosecutor may incur, by taking the benefit of legal agency, should be defrayed by himself, with the prospect of reimbursement from the penalty, or share thereof, payable to him. There is no authority for the common practice of

allowing law agency in game and other prosecutions under public statutes, and taxing their accounts on the highest scale, as applicable to criminal prosecutions. Such professional charges are never allowed in English practice. The Court of Justiciary held, in dealing with a conviction under 4 Geo. IV., c. 34 (master and servant), "that complaints under this and similar statutes have been repeatedly decided not to be regular legal instruments."—20th May 1839, *Gordon*, 2 Swinton, 390. In a case (*McKenzie*, 11th June 1838, 2 Swinton, 152) under the Embezzlement Act, it was observed by Lord Meadowbank, "A verbal complaint would have been sufficient; and I can only suppose that the justices took it down in writing, because the oath afterwards taken must refer to it."

When the prosecution is at the instance of the fiscal, as in prosecutions under the Registration Act, there does not appear authority for allowing him to charge law expenses against the party convicted. As a public officer, he ought to be paid by Exchequer, or by the county, as he is in other criminal cases. Where a nominal fine of few shillings appears sufficient in the case of mere forgetfulness in poor man to register the birth of a child within a certain brief space, it is painful to add one or two pounds of law expenses. Such procedure is apt to defeat the important object of the Act, by rendering it highly unpopular. It was well observed by the late Justice-Clerk (*Hope*), in a case where an award of expenses was made to a fiscal, in addition to a small fine for the offence of breach of the peace,—“There is no necessity in criminal cases for awarding expenses against the criminal. The expenses may have nothing to do with the nature or magnitude of the offence. They may be great proportionally, from the number of witnesses to be examined, the distance they come from, the necessity of adjournments, and many other causes.” The conviction was therefore quashed, although the statute authorised the award of expenses; and these, together with the fine, were greatly less than what might have been awarded solely as fine.—15th July 1843, *Gilchrist*, 1 Broun, 570.

In order to establish the evil which has resulted from leaving to justices the unrestrained power of awarding costs to cover the employment of legal agency in preparing the complaint, and conducting prosecutions under public statutes, the following cases are cited from the Report of Appeals under one statute, the Day Game Trespass Act (2 and 3 William IV., c. 68), by which the penalty is limited to 40s., “*with the costs of conviction*,” which appears to exclude the costs of previous procedure.

In the case, 24th November 1845, *Russel*, 2 Broun, 572, the conviction was for L.1 of penalty, and L.1, 17s. of costs.

In 22d July 1848, *Smith, Arkley*, 513, the penalty awarded was 10s., while the expenses were L.3, 15s. 2d., being L.1, 15s. 2d. beyond the maximum penalty.

In 1st June 1844, *Russel*, 2 Broun, 211, the penalty decreed was the maximum of L.2, with L.3, 12s. 6d. of costs.

In 13th July 1846, Hume, Arkley, 88, the fine was L.1, with L.3 of expenses, payable to the fiscal, who was the prosecutor.

A case under the same Act has been mentioned, where, from the necessity of obtaining letters of supplement from the Court of Justiciary, the expenses awarded were nearly L.10, in addition to the penalty.

Fortunately, these startling facts have at length attracted the notice of the Supreme Criminal Court. In the case, 22d March 1858, Porter (Jurist), a conviction under the Day Trespass Act was sustained; but the late Lord Justice-Clerk (Hope), who was ever ready to detect and censure oppression, and vindicate the oppressed, remarked,—“The fine is 2s. 6d., and the expenses awarded L.3. 14s. 10d. I have often observed that the expenses of these small prosecutions are excessive. It seems proper to make some inquiry as to the table of fees according to which the expenses have been charged.” Accordingly, the Court, “found that no sufficient grounds have been stated for suspending the sentence complained of, and therefore repelled the reasons of suspension; but before refusing the bill of suspension, ordain the Justice of Peace clerk to report whether there is any, and what, table of fees for the expense of proceedings in the Justice of Peace Court, and to transmit such table; and also to report how and in what manner the expenses in this case were taxed, and to transmit the account thereof, along with said table, to the Clerk of Court.”

It is trusted that this inquiry, so judiciously ordered, will result in a clear settlement of the question as to what forms the proper subject of costs of prosecution for penalties, or conviction under penal statutes, and the relative power of justices to award sums in name of costs or expenses. It is obvious that there ought to be one clear and uniform practice throughout Scotland under the same statute. It is in vain that the Legislature has cautiously meted out the penalty as adequate to the offence, and restricted the power of the justices in awarding the relative penalty, if at the same time they have conferred on the justices an arbitrary power to double, or quadruple, the penalty, under the vague name of expenses, restrained by no table or regulation but the caprice of some rural justice, or rather of the Clerk of Court, generally some practising attorney. It has been held in England that the justices must themselves ascertain and fix the amount of costs, and cannot delegate that duty to another, or the conviction would be vitiated.—See Burn's Justice (Chitty's Edition, *voce* Conviction, and cases therein cited).

We observe that a Royal Commission has recently been issued to inquire into the costs of prosecutions generally, and also into the fees payable to clerks of the peace, and clerks to justices, and allowances to constables. As is usual in such proceedings, the benefit of the inquiry is confined to England.

WHAT IS A CONTRIBUTORY?

THIS is a branch of the interminable litigation which is rising out of the ruins of the Western Bank. Are there any circumstances in which a shareholder is not bound to pay the calls made by the liquidators of an insolvent joint stock company? The question will once bring under judicial consideration the whole of the important legislation of the last two years in regard to these associations.

The statutes forming the new law on this subject are the 19 and 20 Vict., c. 47 (1856), 20 and 21 Vict., c. 14 (1857), 21 and 22 Vict., c. 60 (1858), and, as regards banks, 20 and 21 Vict., c. 49 (1857). The object of these measures was, to remedy the evils which had arisen from the vast joint stock corporations of the present day being treated according to the old law of partnership, like associations of one or two individuals. The principle of the Joint Stock Companies Acts is, that the credit of a company should be judged in the same way as the credit of an individual, the right of suing individual shareholders should be abolished, and that contributions should be enforced by proceedings taken against the concern. The old rule remains, that each partner is liable for the whole debts of the company; but the concern is now treated as an individual in a state of insolvency, the sole difference being, that the name of "liquidator" is given to the person entrusted with the duties of trustee.

When the winding up is voluntary, the duties of the liquidators are enumerated in sec. 104 of 19 and 20 Vict., c. 47, extended by subsequent Acts. In particular, they "may, at any time after the passing of the resolution for winding up the company, and before they have ascertained the sufficiency of the assets of the company, the debts in respect of which the several classes of contributories are liable, call on all or any of the contributories, *to the extent of their liability*, to pay all or any sums they deem necessary to satisfy the debts of the company, and they may, in making a call, take into consideration the probability that some of the contributories on whom the same is made may partly or wholly fail to pay their respective portions of the same."—19 and 20 Vict., c. 47, sec. 104. In fixing the amount payable by any contributory, he shall be debited with the amount of all debts due from him to the company, including the amount of the call, and shall be credited with all sums due to him from the company on any independent contract dealing between him and the company, and the balance, after making such debit and credit as aforesaid, shall be deemed to be the sum due.—20 and 22 Vict., c. 60, sec. 17.

By sec. 19 of the 20 and 21 Vict., c. 14, where a company is in course of being wound up voluntarily, and proceedings are taken for the purpose of having the same wound up by the Court, the

Court may adopt the former proceedings, and direct that the voluntary winding up should continue. Where this has been done, or where an order has been made for winding up a company compulsorily, the mode of recovering calls is as follows :—"It shall be competent to the Court in Scotland during session, and to the Lord Ordinary on the Bills during vacation, on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls which they may wish to enforce, and of the amount due by each contributory respectively of the date when the same became due, to pronounce forthwith a decree against such contributories for payment of the sums so certified to be due by each of them respectively, with interest from the said date till payment, at the rate of L.5 per cent. per annum, in the same way and to the same effect as if they had severally consented to registration for execution, on a charge of six days, of a legal obligation to pay such calls and interest ; and such decree may be extracted immediately, and no suspension thereof shall be competent except on caution or consignment, unless with special leave of the Court or Lord Ordinary."—21 and 22 Vict., c. 60, sec. 5. Suspension is therefore the form in which any question with respect to the liability of a shareholder ought to be tried ; but another remedy is open under sec. 25 of the Act of 1856. "If the name of any person is, without sufficient cause, entered or omitted to be entered in the register of shareholders of any company, such person may, by summary petition to the Court of Session, apply to such Court for an order that the register may be rectified."

Such, generally, is the nature of the machinery provided for enforcing contribution. The next thing to be considered is, against whom may the above powers be exercised ?

A contributory is defined to mean (sec. 65, Act 1856), an existing or former shareholder, upon whom calls are authorised to be made ; and the term shareholder is, by sec. 19, restricted to persons actually on the list of shareholders,—it being declared that "no notice of any trust, express or implied or constructive, shall be entered on the register, or receivable by the company," etc. ; but this, by the 15th sec. of the 20 and 21 Vict., c. 49, does not apply to any banking company. Further, every person who, within three years prior to the commencement of the winding up, has ceased to be a shareholder, is for the purpose of contribution deemed to be an "existing" shareholder, having in all respects the same rights and being subject to the same liabilities as if he had not ceased to be a shareholder, with this exception, that he is not liable in any debt of the company contracted after the time when he ceased to be connected with the company. In the case of banking companies, registration under 20 and 21 Vict., c. 49, does not affect obligations incurred previous to registration. "Every person who, at or previously to the date of the registration under this Act of any banking company hereby authorised or required to be registered, may have

held shares in such company, shall, in the event of the same being wound up by the Court or voluntarily, be liable to contribute to the assets of the company the same amount that he would, if this Act had not been passed, have been liable to pay to the company, or for or on account of any debt of the company, in pursuance of any action, suit, judgment, or other legal proceeding that might, if this Act had not been passed, have been instituted or enforced against himself or the company" (sec. 9). This clause leaves the obligations of the shareholders in a bank in precisely the same position that they occupy at common law; but it is to be observed with respect to the new machinery to which they are now subject, that, as has already been explained in the House of Lords, the sum raised by the liquidators does not represent any demand of the shareholders *inter se*, but the aggregate demand of the whole creditors on the whole partnership—the solvent shareholders being bound to make up this sum, not by virtue of any engagement contained in their deed, but because, by the general rules of law, every partner is liable to the whole demands of the partnership (Robinson's case, 356, 6 De. G. M. and G. 572). At the same time, in meeting this demand, it is declared that, in ascertaining the liability of existing and former shareholders, every transferee of shares shall, in a degree proportioned to the shares transferred, indemnify the transferor against all existing and future debts of the company (sec. 66, Act 356).

By sec. 25 of the Act of 1856, the register of shareholders is *prima facie* evidence that every person thereon is liable in calls. Two things are necessary to constitute a shareholder—(1) acceptance of shares, (2) registration. If a person's name remains on the register after that of another transferee should have been substituted, or if it has been recorded without his sanction, the burden lies on him of making this out. On this subject many questions have occurred in the English courts. Into these, however, we will not for the present enter. Our purpose is to examine a still more important class of cases, which seem to support this proposition,—*If a person buys stock on the faith of false and fraudulent reports, issued by the Directors and adopted by the company, he is not liable as a contributory.* The most important Scotch authority on this point is a case understood to be now under appeal (*Tulloch v. Davidson*, 3d June 1858, 10 D. 1045),—an action founded on certain alleged frauds of the Directors of the Aberdeen Bank. Lord Cowan, in delivering the judgment of the Court, distinctly laid it down, that the circulation among the shareholders of false and fraudulent reports, calculated to give a fictitious value to stock in itself worthless, and the declaration of dividends which had never been earned, were sufficient to make the Directors personally liable in respect of shares purchased on the belief that the state of the concern was truly represented. In this case, the fraud was treated as the fraud of the Directors, and not of the Company; and the same distinction has been ob-

served in English practice. If a shareholder has been induced to purchase his shares by the fraudulent representations of the Directors, the fraud is no reason why his name should not be put on the list of contributories. The reason is, that though the Directors may be personally liable to the shareholders on account of the deceit, they cannot be considered as the agents of the general body of the shareholders to commit a fraud. In *Dodgson's case*, 3 De G. and S. 90, the V. C. said, "The suggestion of fraud does not affect the case. No fraud is attempted to be fixed on the general body of shareholders. Whatever fraud there be, if fraud there be, is charged against the Directors, who cannot be the agents of the body of shareholders to commit a fraud. The Directors only are liable for their conduct. If Mr Dodgson could associate the *whole body in any plan to entrap him* into taking shares, I would probably know what to do with such a case." In *Bernard's case*, 5 De G. and S. 283, the contributory pleaded that the shares in a certain bank had been purchased on the inaccurate misrepresentations of the Manager in a letter; but the V. C. said the statements of a Manager or Director, however fraudulent, were no ground for exempting a shareholder from liability. So, where a party became a shareholder and Director of a company on the representations of one of the Directors that it was in a flourishing condition, whereas it was on the verge of insolvency, it was held that the misrepresentation was no ground of relief (*Holt's case*, 22 Beav. 48). But the consequence is directly the reverse where the misrepresentation becomes the act of the *whole* company. At least, so the English Courts have decided. The secretary of a company in a hopeless state of insolvency issued a circular, setting forth "that there had been a great extension of the business of the company;" and "that the Directors had created an additional capital of L.200,000 by the issue of 40,000 new shares;"—both of which statements were absolutely false. Upon these facts, the M. R. said, "Where certain persons set a project on foot, and by fraudulent misrepresentations a number of persons are induced to become shareholders and incur liabilities, all are liable to contribute to the debts of the concern—their equity lying against those who made the misrepresentations. But it is a new proposition to me, and I think no authority can be found, that persons taking shares are liable in such a case as this, viz., where a company having been formed *bona fide* to carry into effect a particular object, and it has become obvious from the existence of debts and the absence of funds, that the project will not succeed, and the company is in such a situation that it cannot carry on its affairs, and that no intention of attempting to do so remains, but the only question is, what is the amount of the liabilities of the company, and how they are to be discharged?—and that in this state of circumstances the Directors, with a view of relieving themselves and the other shareholders from these liabilities, and to get other persons to participate in them,—issue representations which

they know to be false, in order to induce other persons to become shareholders, not for the purpose of carrying on the concern, but really for the purpose of paying a portion of their debts.—I am of opinion that persons becoming shareholders under such circumstances cannot be compelled to contribute" (Bell's case, 22 Beav. 35). On the same ground, in *Wontner v. Shairp*, 4 C. B. 404, a person who had taken shares on the faith of a statement in an advertisement by the Committee, that 120,000 shares had been issued, whereas 58,000 only were allotted, was held not bound by his signature to the subscription deed, and entitled to recover his deposit.

Where the fraud is the fraud of the company, the case is treated in precisely the same way as a transaction between two individuals. A person inducing another to contract with him by means of misrepresentation, cannot enforce the contract; and no more can a joint stock company be permitted to entrap shareholders by the affectation of a stability to which it is a stranger. Let us suppose (says V. C. Kindersley) a man carrying on a very losing trade, in which he has lost all his money, and that he induces another to enter into partnership by representing the business to be very valuable, and that the capital brought into the concern would remain undiminished: it is clear that he could not compel the person whom he had deceived to contribute towards the loss. So, if a false representation were made, not by him, but by an individual whom he empowered as agent, and though that agent might not be authorised to make such false representation, still the agent being employed, the principal cannot insist on the contract being performed. Now, if such be the rule, can it make any difference that the person making the false representation, instead of being an individual, is a company or corporation carrying on the business?"—*Brockwell's case*, Aug. 5, 1857; 3 Jur. N. S. 879.—This was the case of a shareholder in the Royal British Bank, who bought in, on the faith of a false report put forth by the Directors to the Company, adopted by the Company at a general meeting, and acted on in the payment of dividends. The V. C. refused to put him on the list of contributories. "The report (said his honour) was circulated to the public,—I will not say with the express direction of the Company, but certainly with the sanction of the body of Directors,—was published in the newspapers, and made known to the public. Now, I apprehend the clear rule deduced from all the cases to be, that if a company makes representations which are false, a person who has been induced to take shares, thereby is not bound; but if the representations are made by a person who is not an agent of the company, he is still bound to the shareholders, though he has a remedy against the parties who deceived him. In the *National Exchange Co. v. Drew*, 2 M'Q., 125, it was very ingeniously argued, that the shareholders were not the deceiving parties, but were themselves deceived; but the answer to that is, that a company is a body which, by its nature, can only act by its Directors; that it is the duty of the Directors to make re-

ports, and to make true reports ; and when these reports are received, adopted, and acted upon, they become the reports of the company as a body.

Such is the substance of the latest cases on this important question. It is understood that, among the victims of the Western Bank, there are cases exactly parallel to some of those above referred to. It remains to be seen whether, in this country, their liabilities will be similarly determined.

THE TITLES TO LAND ACT.

(Continued from p. 494.)

SECTION V.—This section deals with the obligation to infest, precept of sasine, and clause of resignation. The infestment, or, more correctly speaking, the instrument of sasine, having been dispensed with, it has been considered no longer expedient to require the insertion in any conveyance of the obligation to infest, and the precept of sasine. It is not merely the words, “And I oblige myself to infest the said A. B. and his foresaids,” which are rendered unnecessary, but also the remainder of what is usually, although somewhat incorrectly, termed the obligation to infest, viz., “to be holden *a me vel de me*.” Where no holding is expressed, it is implied that the lands are to be held in the same manner as the granter of the conveyance held, or might have held, the same. But in the rare cases where it is desired to express a different holding, then the latter part of the clause must be inserted with the requisite alteration to suit the circumstances. The obligation to infest, although expiring along with the instrument of sasine, is believed to have existed for a much shorter period. Its germ first appeared in the contract of alienation, when the seller obliged himself that he would, with all convenient speed, duly and validly infest and seise the purchaser *titulo oneroso* by two separate charters and manners of holding. The contract of alienation, and the two Latin charters following upon it, the one containing a *tenendas a me*, and the other a *tenendas de me*, gradually—that is, in the course of the century from 1540 to 1640, or thereby—gave place to the disposition, which contained within itself all that the contract, the charters, and the procuratory of resignation formerly contained separately, and the obligation to infest among the other clauses, with which we are so familiar. But the instrument of sasine had been in use for upwards of a century before the obligation to infest took its formal shape. It is rather curious that, in ancient times, many improvements upon conveyancing were introduced by professional men themselves without the help of Acts of Parliament : and we know not whether to regard it as a sign of greater exactness

or greater helplessness, that now the most trifling changes have to be accomplished by statutory authority. The obligation to infest was shortened by the 10 and 11 Vict., c. 48, and at length its chequered existence has been practically brought to a close. *Requiescat in pace.* The precept of sasine shares the same fate. The old precept was a warrant to the bailies of the superior to pass to the ground, and there deliver, by symbols, heritable state and sasine, real, actual, and corporal possession of the lands. It would be difficult to say when this practice originated; but there is extant an old Act of King David II., passed in 1367 or 1368, for the purpose of enabling sheriffs to grant sasine within the courts of their sheriffdoms, instead of upon the ground, to parties who were the rightful heirs of lands, held for the time by the English. The Act of 1845 put an end to the necessity of giving sasine upon the ground, and the precept was thenceforth directed to a notary public instead of the superior's bailies, as the act of giving sasine then consisted simply in expediting and recording a notarial instrument. But as no such instrument is now required, the precept or authority to the notary would have had no meaning, and the deed is accordingly shortened to that extent. The provisions of the clause apply not only to dispositions and charters, but to the great variety of deeds and writings which will be found enumerated in the table previously given (No. 22, p. 489). Among these, decrees of adjudication will be found ranked; and accordingly, both the styles of summonses and the relative decrees must be altered to suit the new practice. Mr Parker, with that professional zeal which does him credit, has already prepared an appendix to his work on Adjudications, embodying styles adapted to the Titles to Land Act, and with Reference Notes upon the statute, which, we need not say, are well worthy of the attention of the profession.¹ As regards the clause of resignation, this section provides, that such a clause in any conveyance shall be held to import a resignation *in favorem* only, unless specially expressed to be a resignation *ad remanentiam*, and that nothing therein contained shall prevent an instrument of resignation *ad remanentiam* being expedited, and recorded on a conveyance heretofore granted, and containing a clause of resignation in the form authorised by 10 and 11 Vict., c. 48. The necessity for these provisions is explained by Mr Ross in his Analysis (p. 6). By the Act 10 and 11 Vict., c. 48, the clause of resignation, as it stood, was either a warrant for resignation *in favorem* or *ad remanentiam*. So long as an instrument of resignation was required, this was of no moment; but, now that the instrument has been dispensed with, if the clause still remained indefinite, a consolidation of the property with the superiority would be effected by simply recording the conveyance. This might not always be desired, and in some cases might lead to inconvenience; so it was better to provide for the resignation

¹ Appendix to Notes on the Diligence of Adjudication, by John Parker, Principal Extractor in the Court of Session; with New Forms of Summonses adapted to the provisions of the Titles to Land (Scotland) Act, 1868.

ad remanentiam being specially mentioned, than to run the risk of consolidation *ipso jure*.

Sections VI. to XI.—These sections refer to entry with the superior, under the different forms of confirmation, resignation, and writs (as they are now termed) of *clare constat*. It would have conferred a greater boon upon the community had the Act dealt even more stringently with those entries, as they are a heavy burden upon the land in Scotland. Neither in England nor in the colonies do galling remnants of feudalism of a like nature exist; and if we are to keep pace with the intelligence of the age, another step must be soon taken finally to extinguish them. The only land in England in at all an analogous position to our *fens* is copyhold, and the Legislature has been so alive to the necessity of having copyholds enfranchised, that various Acts have been passed to accomplish the object. No later than last session another copyhold statute was enacted, which came into operation on the 1st of October, having for its object, to facilitate still more the extinction of manorial rights. This is accomplished by a compulsory sale of the “*feu-duties*,” as the payments to the over-lord may be quite properly termed, at the desire of either the superior or the vassal, and at a given number of years purchase. But even these lands are not burdened with a double set of titles, such as exists in Scotland; and we should be satisfied with a measure which left *feu-duties* untouched, if it only obviated the necessity of “*entering*” with the superior, that is to say, if it abolished the nuisance and extortion of having to take out a set of titles which are only rendered necessary by paying obedience to feudal fictions. Which of our Scottish legislators will have the courage to introduce a system which has been enjoyed in England for upwards of five centuries? But, to return to the reforms already obtained, we proceed to notice the entry with the superior by the different modes; and it is satisfactory to be enabled to state, that the Act has done all it possibly could to render them less expensive.

(1.) *Confirmation*.—If antiquity could have saved the charter of confirmation from mutilation, there could have been no difficulty in substantiating such a plea in its favour. Some conveyancing authorities still maintain that the spurious Act, said to have passed in the reign of Robert Bruce, about the year 1325, after the model of the “*Quia Emptores*” of Edward, is genuine; and Ross, in his *Lectures on Conveyancing*, conjectures that it is the foundation of the holding *a me de superiore meo*. It can scarcely be believed that, if the Act had been genuine, the practice of Scottish conveyancing would have been permitted to continue so widely different from the intentions of the Legislature. Mr Rodger, our latest, and, as it appears to us, most satisfactory authority upon conveyancing antiquities, finds the origin of the same holding in an Act of the Scottish Parliament, 14th March 1540–41; and, if he be right, then it also is the origin of the charter of confirmation, as we now understand its use. But a charter of confirmation, although not applied for the

completion of a public entry in the same way as at present, has been known in Scotland for a much longer period, and before the charter of resignation. Examples are yet extant, dating so far back as the twelfth century, but these are invariably mere *confirmations* of some previous grant which the donee wished secured by a fresh title. Since it began to be used as a means of completing an entry with the superior, or say, since the beginning of the seventeenth century, there has been little change upon its form; and the ordeal to which it has been subjected by the Titles Act, is a very violent evolution for so respectable a bit of antiquity to undergo. In fact, the charter of confirmation is abolished; the fragment or residuum, now to be named writ of confirmation, having little in common with the solemn document engrossed on vellum, which, for so long a period, formed a prominent step in a progress of titles. The "writ," is a short doquet to be indorsed on the deed sought to be confirmed, the same schedule serving as a style both for Crown writs and those from subject superiors. The conveyancer, in preparing the latter, will take care not to trench upon the royal prerogative, by commencing the writ with, "We confirm this deed," as that is a style of phraseology not to be lightly used by any one but the Presenter of signatures. Superiors are bound to grant a writ of confirmation when asked, if a charter or other document, showing the tenendas and reddendo has been produced to him, and the duties and assualties paid or tendered. The confirmation so granted confirms the whole prior deeds and instruments necessary to be confirmed in order to complete the investiture of the party. There are some specialities with regard to the mode of preserving a record of the Crown grants, but these refer more particularly to the Crown Officials. The writ of confirmation, like the charter, requires no issue, or process equivalent to infeftment, and it consequently does not require to enter the Register of Sasines.

(2.) *Resignation*.—When the bill was first laid before Parliament, it was not proposed to deal with entry by resignation at all; but some of the legal bodies, and among others the Faculty of Advocates, having pointed out the desirability of placing both kinds of entry upon the same footing, the bill was subsequently altered to that extent. If confirmation merely had been brought within the healthy influence of the statute, there would have been a temptation to superiors (or their agents) to insist on entry by resignation, to the confusion of titles and the annoyance of vassals; and it is matter of congratulation, that Government yielded to the request, to apply the shears equally to both forms. A charter of resignation, according to the old style, to subjects of the value of from three to our hundred pounds, now lies before us. It is written on three sheets of stamped vellum, and, together with the instrument of sasine upon it, must have cost the vassal at least L.16. The Act of 1845 shortened somewhat the style of these wordy documents;

but, previous to the Titles to Land Act, the entry (independent of double feu, or whatever casualty there may have been) would have cost not less than L.12. According to the schedule appended to the Act, the writ of resignation need not be more than a single sheet, which, by the scale of fees presently in force, would cost perhaps twenty shillings. It is not to be expected, however, that professional men will undertake the responsibility of granting an entry to a vassal for such a remuneration, or that the vassal's adviser would consent to revise the writ for five shillings, as if he were a sheriff's officer serving some paltry summons. And, accordingly, a proposed new scale of fees has already been drawn up to suit the requirements of the Act, and is at present in the hands of committees of the practitioners in Edinburgh. The Glasgow scale (which has long been higher than that sanctioned by the Society of Writers to the Signet) will also be forthwith adapted to the new styles. Allowing, therefore, for a fair professional remuneration, it will at once be seen that the benefit to the public by the change contemplated by the statute, is of the most substantial kind. We say, "*contemplated* by the statute," as, unfortunately, in consequence of one of those blunders which seem to be inseparable from Scotch Acts, in the case of writs of resignation by subject superiors, the public will not get the full benefit until the usual addendum be provided next session, of "an Act to amend the Titles to Land (Scotland) Act." We cannot help thinking that the error occurred from the foolish parsimony of having no one on the spot able to give the bill, in all its stages, a thorough supervision—a supervision which it is vain to expect from the Lord Advocate himself during the turmoil of the parliamentary session. There is an official in London, drawing one thousand pounds per annum, for presumed attention to the legal business of Scotland,—but he is of an ornamental rather than a useful character. The error occurs in the ninth section of the statute, which provides for the writ of resignation from subject superiors. Unlike the writ of confirmation, the writ of resignation is not complete in itself. It requires to be followed by sasine, or its equivalent. Accordingly, after the writ has been indorsed upon the vassal's deed, the deed and the writ must both be given in to the register, along with a warrant of registration; and, it is provided, that the recording of the same should have the same legal force and effect in all respects as if a charter of resignation had been granted, and such charter had been followed by an instrument of sasine duly expedite and recorded. But, as both the deed and the writ of resignation must enter the register, the recording of both has the double effect of being equivalent to an instrument of sasine upon the deed as well as upon the writ, thus creating a mid-superiority. In order to obviate this effect, section VIII., which refers to Crown writs, concludes with the proviso, "that the recording of such deed along with such writ *shall NOT* have the effect of an instrument of sasine following

on such deed. But the provision in article IX., which ought to have been of the same tenor, reads, 'Provided always that the recording of such deed along with such writ SHALL HAVE the effect of an instrument of sasine following on such deed'"—the "not," is short, being left out, and the clause thus enacting the very opposite of what was intended. Mr Ross (Analysis, p. 19) suggests that "the literal words of the proviso, in the ninth section as it now stands, ought to be disregarded, and effect given to what is clearly the object and intention of the proviso; for by the omission of the negative, the proviso is deprived of all meaning, and the section is reduced to the position in which it would have stood if the whole of the proviso had been omitted." It gives us pain to differ from the learned author; but we know of no recognised mode of interpreting statutes, which could warrant the plain terms of the Act being disregarded, in order to give effect to what was contained in the bill,—for that is the author's proposition. Nor do we coincide in the opinion, that by the omission of the negative, the proviso is deprived of all meaning, and that the section is reduced to the position in which it would have stood if the proviso had been omitted. Instead of the proviso being deprived of meaning, it has a very plain and unmistakeable signification, but unfortunately it is the very reverse of what was intended. It provides that the mid-supremacy shall be reared up, which it was intended to prevent. If the proviso had been omitted, there might have been room for arguing from the sense of the preceding section that the same principle was intended to apply; but by the insertion of a proviso having a clearly opposite meaning, it turns the presumption the other way, viz., that by the use of different words it was intended to make a distinction betwixt Crown writs and writs from subject-supremacies. In the absence of the provision also, there might have been room for guarding against the creation of a mid-supremacy by the warrant for registration. The principle which the Act introduces with regard to registration, is, that it shall only operate on behalf of the party giving in the writ. In like manner, it might have been assumed that it would only operate on behalf of the object specified in the warrant. And, as there is no specific schedule given of a warrant of registration following upon a writ of resignation, there would, it is presumed, have been no incompetency in so qualifying it as to show that the vassal's deed and superior's writ were given in for the purpose of infeftment upon the latter alone. But, as the Act stands, the warrant of registration, clearly enough, could not control the express terms of the section, and we are afraid the "Act to amend an Act" is the only remedy. We may remark, finally, on those clauses, that the writ of resignation operates as a confirmation of all prior deeds and instruments necessary to render the investiture complete.

(3.) *Writ of Clare Constat.*—The alteration of the name and style of this deed, provided by section XI., was necessitated by the

abolition of the sasine. Formerly the deed was a precept from the superior to infeft the heir. It is now a writ acknowledging the heir, which, when recorded in the register of sasines, completes his investiture. It would have simplified the matter still further, if the writ of clare constat had been abolished, and a short schedule been introduced, entitled, "writ of confirmation of heir," which might have been indorsed upon the ancestor's title, or upon the decree of service where such was required. The writ, to be effectual, must still be registered during the lifetime of the heir. It is provided that this writ also operates as a confirmation of all previous deeds necessary for the purpose of completing the title.

Where charters by progress of any description are still used, section X. provides that it shall be competent and sufficient to refer to the tenendas and reddendo of the lands, as set forth in any recorded deed; and subject superiors may be compelled to grant charters in this form. However, as the superior can also be compelled to grant entries according to the still more abbreviated forms introduced by the Act, it is improbable that the vassal will ever trouble the superior for a charter according to the old style, however much disposed the superior's agent may be to recommend it.

Section XII.—The object of this section is the very excellent one of obviating the necessity of the process of adjudication in implement, when a party has acquired right to lands by means of a general conveyance. Instead of the costly and dilatory process of an action in the Court of Session, the section provides that the title of the general disponee, or of those acquiring the lands through him, may be made up by notarial instrument, which, on being recorded in the Register of Sasines, is equivalent to a recorded deed from the party granting the general conveyance of the lands contained in the instrument. Where the subjects conveyed are heritable securities, then the recorded notarial instrument is equivalent to a recorded assignation from the granter of the general conveyance. There is one provision attached to the section, to the effect that where the notarial instrument shall be expedited by a party other than the original disponee, the instrument shall set forth the title by which the party acquired right to the conveyance, and the nature and extent of his right. But there is a provision even more important which is omitted from the section, although it may be gathered up from the schedule, the provision, indeed, which embodies the very principle upon which the section is founded. The importance of the omission can be most readily explained by referring to Mr Koss' Analysis (p. 9). He mentions various cases relating to general dispositions, and, in particular, the case of *Graham v. Hislop*, 3d Aug. 1753, where the Court were unanimously of opinion "that a precept to give infeftment in lands, described in general to belong to the granter of the precept, is a sufficient warrant to give infeftment in every particular tenement which, by production of the granter's infeftment, is vouched to come under the general descrip-

tion." Mr Ross then adds, "the Act proceeds upon this principle of law, and authorises a notarial instrument to be expedited on a general conveyance; declaring, however, that it shall set forth both the deed or instrument by which the granter of the general conveyance acquired a real right in the lands carried by the conveyance, and also the general conveyance itself," etc. It is evident that, unless the notarial instrument connected the general disposition with the lands in which the granter had a real right, it would not accomplish its object; and that the principle of the section lies in the setting forth of the deeds establishing a right in the person of the granter of the general conveyance. But, in the section, there is no such declaration as Mr Ross assumes to exist. Neither by provision nor declaration, nor in any way whatever, does the section advert to this important principle. The *schedule* containing the form of the notarial instrument points out that these deeds must be set forth, but the schedule also points out that where the instrument is expedited by a party other than the original donee, his title must be reduced and the nature and extent of his right described. The section, nevertheless, has a special provision applicable to this latter and less important portion of the deed, while it does not specially provide for the titles of the general donor being set forth. Either the one provision was unnecessary or the other is an omission. These observations, of course, are merely critical remarks upon the mode in which the section is drawn, as the form of the schedule sufficiently guards practitioners against the chance of overlooking the important principle upon which the section proceeds.

Sections XIII. and XIV. An unrecorded conveyance may pass from hand to hand, with great facility, by the provisions contained in these two sections. Short forms of assignments are provided which may either be written on the deed or be separate from it; and the holder of the conveyance having an assignment in his favour, may record it along with the assignment in the appropriate register of assizes. The warrants of registration given in the schedules applicable to the recording of a conveyance, provide also for cases where there is one or more assignments. Where any party has acquired right to an unrecorded conveyance by general conveyance, service, assignment, adjudication, or otherwise, a form of notarial instrument is provided, by which the party can put the title in shape for recording, and be placed in the same position as if the original conveyance had been granted to himself; and along with a warrant of registration thereon, had been recorded on the date of recording the notarial instrument. For example, if a party had purchased, before the commencement of the Act, a piece of ground in which the owner was not infeft, the title he would obtain would be, the open disposition of the seller, with a disposition and assignment in favour of himself. The purchaser must now therefore expedite a notarial instrument, setting forth the disposition in favour of the seller (and which must be stated in *gremio* to be recorded in the register of

sasines along with the instrument), according to the form provided in the Act, and also specifying the disposition and assignation in his own favour, whereupon the form concludes, that the instrument is taken by the purchaser, in the hands of the notary public, in terms of the Titles to Land Act. Upon the disposition, with a warrant of registration, and the instrument being recorded in the Register of Sasines, the property will be as effectually vested in the purchaser as if he had obtained a disposition from an entered vassal, and been infeft according to the former practice. A question may arise whether it be not incompetent to record a disposition after the death of the disponee, following the analogy that a sasine had to be registered during the life of the party in whose favour it was taken. If it were so held, it would considerably abridge the utility of the clauses now under consideration. But we are disposed to think that there is no limitation of this kind upon an assignee in recording the original disposition, as the expression of the Act is precise, that when the disposition and relative assignations, or disposition and relative notarial instrument have been recorded, it should operate in favour of the assignee, as if the disposition had been granted to himself, and been registered of the date of recording the assignations or notarial instrument.

We have been informed that since the Act came into operation, various practitioners are conducting their conveyancing practice as if no such statute had been passed. This is a system very greatly to be deprecated, for various reasons, but chiefly because it gives the public an opportunity, of which they will not be slow to avail themselves, to tax the profession with being actuated by selfish and mercenary motives. It would have been much better to have determinedly opposed the passing of the Bill, than to endeavour to evade its provisions now that it has become law. It is too much to take for granted in these days, that clients are not as well aware as their law-agents, of the measures which have passed through Parliament; and although nothing can be easier for professional advisers, when acting in concert, to draw out lengthened deeds when short forms might suffice, and have been provided, all unprofessional work of this nature will be sooner or later detected and exposed. For the sake of the good name of the profession, and in order to merit a continuance of that confidence on the part of the public, without which lawyers would soon cease to occupy the eminent position which they at present hold, it is most desirable that every member should at once acquiesce in the inevitable, and give to the community the full effect of the benefits conferred by the Act. We believe, indeed, that the great body of agents, both in town and country, have acted upon these views, and that those who still hang by the old system are a very small minority.

Review.

Meeting of the Court.—We resume our monthly notes with our annual protest against the excessive length of the long vacation. The misery of this enforced idleness still continues. Everybody has been in town for more than a month; but the Court does not meet till the 12th; and how to fill up the interval is a question that is now disturbing many an anxious man. Why is he compelled to hang about the streets in such wretched weather, with nothing on earth to do? Because an accidental blunder in the last Act is still uncorrected. Thus a fortnight of the best part of the year is annually wasted. Surely it would be more *decent*, with so much business on the rolls, to begin earlier, and take a longer rest at Christmas. Happily the business is now not much in arrear; but this has been obtained in a manner that is at least not fair to the judges—for it is on their account that we are chiefly concerned. The protracted sittings of every day last winter are much more than the public have any right to. If the work was spread over a greater period, they could take time to it; and there would be less danger of the country being prematurely deprived of their invaluable services, by reason of over exertion. We insist upon something being done next session. It will be a graceful Conservative Act, to effect a new arrangement of the judicial year, and remove the cause of that universal grumbling which is at present heard on every side.

The Session, it is expected, will be a very busy one. The First Division roll exhibits a total of 95 cases—whereof 11 are summary actions. The Second Division seems to have about 87; there are 40 more in the long roll, but as most of them are either sound asleep or out of Court, they will not give much trouble. It is gratifying to observe that most of the "T. C." cases have been disposed of. The popularity of the Court restored, equality of business follows, as a matter of course. The division of business in the Inner House will no longer be compulsory. In the Outer House the rolls exhibit a most disagreeable disparity. It is very unjust that one or two of the judges should be burdened with the whole work. Lord Penholme and Lord Neaves have respectively 9 and 10 debates. Lord Mackenzie 46; Lord Ardmillan 72. Lord Kinloch, who took up Lord Handyside's roll, has only 9 cases set down; but the possession of 45 out of 103 cases in the first calling list this session, proves that he will come in for his fair share. But on what principle is the business so unfairly distributed? The Outer House judges being all men of commanding ability, it must be mere caprice on the part of the agents—a caprice which has now become so extravagant, that it must be put a stop to. The judges may truly

complain, that they pay too dearly for their popularity; and the client's interest is not much promoted if he is made to wait for months for a judgment which he may get in weeks. In fact, it has been said by a very high authority, that whatever be the nature of the judgment, the sooner a case is through the Outer House the better. Save in cases of no difficulty, the Outer House stage is a mere tentative process, to get at the facts and their bearing; the real struggle must always take place in the Inner House. Some agents are fully alive to this; but others forget it altogether in their admiration of that noblest of all judicial qualities—the sublime faculty of *silence*. It is understood that the Lord President will not exercise the powers of transference conferred by 20 and 21 Vict. c. 56; and the only other remedy will be to make the enrolment an enrolment for the whole of the Outer House judges, and the business can be parcelled out among them by a clerk, as is now done in the Glasgow Sheriff Court. There is no such thing as the right of a suitor to choose his judge. A defender is just as much entitled to be heard in the matter as a pursuer; and, since both would be likely to differ, the best course is to leave the matter to the chance distribution of a public official, destitute of prejudice and feeling. The experience of the Act referred to, has proved that such a power may be safely exercised without danger to the interests of justice.

The next interesting feature of the coming year is the enormous litigation connected with the Western Bank. There is no end of actions,—involving questions in every branch of joint stock companies law,—the liability of particular classes of shareholders and contributories,—persons who have been deluded into becoming partners by the false reports,—of trustees charged in respect of their wards,—of husbands who have married wives of large expectations,—by transferees against transferrers, and so on. How many attempts are being made to make the directors responsible, we cannot tell. These gentlemen have every reason to be thankful that it is now only sought to make them civilly liable.

The Sheriff Courts.—The present month marks another important era in the history of our County Courts. It is now five years since the Act of 1853 effected a revolution in the practice before these invaluable tribunals; and the pension clauses of the Act now come into force. Strange that Parliament was so late in recognising the importance of the office of sheriff-substitute. Till the 1 and 2 of the Queen, he was removeable by his principal at pleasure; and till 1853, the emoluments of the office were certainly not such as to attract a very high class of talent. The salaries, though still inadequate, are now sufficiently valuable to secure a superior class of lawyers, fond of country life, and weary of the excitement of actual practice. In no particular has the operation of the Act of 1853 been more satisfactory than in the entirely new class of judges

which it called into being—intelligent men, sound lawyers, and, above all, persons of energetic habits. It was to be expected, of course, that those worthy old gentlemen, who were trained under the old system, would have some difficulty in adapting themselves to the entirely new demands which were made on them by the *Sheriff Act*. As a consequence, the requirements of the statute, and the wants of the public, have in some places been imperfectly satisfied. But the thanks of the community are due to those devoted and aged servants of the Crown, and in retiring on the allowances which they may now claim, every person must be satisfied that the pension has been fairly earned. According to the duration of service—ten, fifteen, or twenty years—a sheriff is now entitled to retire on a pension of one-third, two-thirds, or three-fourths, of his salary—the salary being computed on an average of the five preceding years. (1 and 2 Vict., c. 119, sec. 6; 16 and 17 Vict., c. 80, sec. 37.) It is now five years since the increase took place in the emoluments of the office; and, as a consequence, it is anticipated that a considerable change is about to occur among the local judges.

The same Act (sec. 37) makes it lawful for Her Majesty, upon the joint recommendation of the Lord President of the Court of Session, Her Majesty's Advocate, and the Lord Justice Clerk, all the time being, to grant authority to any sheriff to appoint one or more additional sheriff-substitutes; "provided always, that such recommendations shall expressly bear that the appointment of such additional officer or officers is essentially necessary for the public service; and, provided also, that no more than *two* additional sheriff-substitutes to each county, shall be appointed under the powers hereby conferred." At least two additional sheriffs should immediately be appointed for Glasgow. We presume that there is now no obstacle to this being done. It *must* be done immediately, otherwise things will come to a dead-lock. The existing judicial staff—representing, perhaps, a greater capacity for the expeditious dispatch of business than could be anywhere else collected—is seriously inadequate to the enormous demands that daily arise.

The last Glasgow Circuit, a declaration was cast, because the retiring sheriff, instead of dictating the prisoner's answers, as he ought to have done, was at the time engrossed with a multiplicity of other pressing concerns. Now, the public interests cannot be neglected in this manner, for the sake of saving a hundred or two to the Treasury.

The Circuits.—The assizes this autumn have been unusually heavy.

Glasgow there were no less than 144 persons indicted for murder. Of these only 100 received sentence of punishment; 26 of the panels were acquitted; the rest were remitted to the Sheriff, or otherwise disposed of. That convictions should only have been

obtained against two-thirds of the persons indicted, is a remarkable circumstance, for which we are unable to account. We only wish here to call attention to the enormous amount of business which the Glasgow Assizes now furnish. It is too much to bring a jurymen from a distance and keep him ten days hanging on. Some new judicial arrangements are obviously required in the city of Glasgow. Its position now is quite exceptional, and it must be dealt with on that footing. Either the number of assizes held throughout the year must be increased, or separate assizes held for the counties of Dumbarton and Renfrew, or the Sheriff must be empowered to impose sentences of four years penal servitude. As to the first proposal, it would be no great inconvenience to the judges of Justiciary, that two of their number should go through to Glasgow by the 10.15, on the first Monday of every month; but the latter seems the most rational solution of the difficulty. The crime furnished by a large city like Glasgow is, to a large extent, of one unvarying type—*theft and previous conviction*. The thief in a large town graduates from one court to another. First he receives thirty days in the Police Court—then sixty before the Sheriff summarily—next he is brought before the Sheriff and a jury, and then confronted with the full-robed majesty of the law. The practice of the Crown Office is to give the poor devil two chances before the Sheriff and a jury, unless the first sentence exceeds eight months imprisonment, when he is sent to Perth Penitentiary. Now, a Glasgow Sheriff may be left to deal with cases of the above kind, in the next and more aggravated stage, as safely as any judge of Justiciary; and were this so, the business at the Glasgow Assizes could be reduced to reasonable proportions.

On the North Circuit the most interesting circumstance was the maiden appearance of the Lord Justice-Clerk. The profession, in all the assize towns, were unbounded in their admiration, and warmly sympathise with them in the feeling. His unvarying courtesy—his uncomplaining patience—his ready appreciation of a point as soon as mooted, formed a pleasing addition to the many admirable judicial qualities which his charges to the jury displayed. These circumstances, taken in connection with the fact that his brother judge was the venerable and amiable Lord Ivory, made the North Circuit this autumn a favourable contrast with another, which is the favourite resort of the junior bar.

Social Science.—The second meeting of the Association for the Promotion of Social Science has been again a great success. Indeed the proceedings at Liverpool have been more interesting than the meeting at Birmingham, last year; but, we are still sceptical that the reading of a series of essays on the many branches of the most inexact of all departments of knowledge, will never lead to any practical result. This is especially true of the department

devoted to Jurisprudence. The discussions here seem to have been left entirely to mercantile men, of an ingenious and speculative cast of mind, but with no practical knowledge of the subject. Now, a very important amendment of the law has come from a practising lawyer; and it is perfectly obvious that it ever must be so. It is only practical men who can satisfy the conditions of that conservative progress which is so well described in the excellent address of the Lord Chancellor of Ireland:—

But the use of timely remedies is a standing duty. The continued neglect of functional irregularity leads to chronic disease and organic disorder. All analogy and all experience, from the pruning of the tree to the repair of the building, teach us that the conservative spirit is necessarily remedial, and that the demands of time cannot safely be postponed. "Time," says Sir Matthew Hale, "is the wisest thing under Heaven. He that thinks that a State can be safely steered by the same laws in every kind as it was 200 or 300 years since, may as well imagine that the clothes that fitted him when he was a child would serve him when he was grown up as a man. The matter changeth the custom, the contracts, the commerce; the dispositions, education, and tempers of men and societies change in a long tract of times; and so must their laws some measure be changed, or they will not be useful for their state and condition." The living law must not be left to perish in the arms of the dead. It is a rule of present obligation, and the statute-book should therefore be revised of all that is not now proper to bind the free citizens of this generation. Some laws have been but the scaffolding of our social system; the removal of such cannot weaken the foundation or shake the superstructure. Others have lost the sanction of public opinion, and a law which cannot be executed without offending public feeling ought not to be retained. Again, there are laws which are now happily surpassed by the improved intelligence and moral convictions of society; laws which may, perhaps, have aggravated evils which they were called on to remove, for these could only yield to better influences.

But, while changes of the above description will never be carried out by anybody but lawyers, some of the papers prepared for the Liverpool meeting will be read with considerable interest. They are valuable for the suggestions they contain. Commercial men can thus make their wants known to the profession, which, in its turn, can more readily than they, devise the mode in which they are to be supplied. For instance, the registration of all private partnerships—an excellent thing—was discussed, approved, and referred to a committee. But the most instructive of all the papers is one which, we regret to say, was anonymous. It was entitled "The Administration of the Law by Justices of the Peace."

The writer severely commented upon the administration of the law by country justices, among whom, he admitted, there were several excellent ones, but that was not the result of the system—they were rather good magistrates among mountains of rubbish. As to borough justices, they were created in batches, were political partisans, hard-mouthed men, and, indeed, about the only men who sought the office. These gentlemen were generally innocent of law, and, indeed, were very frequently intellectually deficient, ignorant, and vicious. The community were, however, compelled to take "justices" and be thankful for it. The writer proposed a legal paid chairman of the court of quarter sessions, a stipendiary magistrate for every borough, and

one stipendiary or more, if necessary, for counties ; and concluded by expressing a hope that Lord Brougham would move in the reform of the law in respect of the "great unpaid."

The abolition of the obnoxious body of amateur judges—urban and rural—would be the crowning glory of a Conservative government. But this is the subject of the next paragraph.

The Unpaid Magistracy.—We have already, on different occasions, made reference in these pages to the absurdity of continuing the unpaid magistracy. Unfortunately for our position, we do not hear of all the blunders which they commit ; but we have not yet forgotten the tipping Bailie from Stirlingshire, who fined a man in 20s., and afterwards, when driving him to prison in his own cart, offered to compound the matter for 5s. on condition that they would drink it together ; nor the worthy Bailie, from the more polished town of Glasgow—where better things might be expected—who found a poor boy guilty of theft, "partly on his own confession and partly on the evidence adduced." Up to this time, these things were seldom, if ever, brought to light, except after an overhauling in the Justiciary Court ; but, the other day, we lighted on a Glasgow daily paper, the *Bulletin*, containing reports of certain "trials" in the Glasgow Central Police Court, from which we proceed to make a few extracts. We are satisfied that a perusal of them will convince every one that some change must immediately take place. At all events we must protest that the pure streams of justice shall be no longer polluted by men who pretend to administer the law *gratis*.

The first case which we extract is one of theft.

Catherine Gallacher was charged with stealing a tartan shawl from the house of her father.

The Assessor—"Is your father living?"

Prisoner—"Yes."

The Assessor—"Is he in the Court?"

Prisoner—"Sir?"

The Assessor—"Is he in the building now?"

Prisoner—"No."

The Assessor—"Are you guilty of that charge?"

Prisoner—"Yes."

Bailie M'Culloch—"Well, well!"

The Assessor—"Say under what circumstances you took the shawl from the house."

Mr Lang, Procurator-Fiscal—"I'll bring out the circumstances."

The Assessor—"It is necessary she should do so before she pleads. (To prisoner)—have you any statement to make?"

Prisoner—"No."

Mr Lang explained to the bench in a confidential manner, that prisoner and others were in the habit of stealing these articles with the connivance of the owners on the chance of being detected, and then the pawnbrokers who had taken the goods in pledge lost the money. The trick had been discovered before now.

The Assessor (to prisoner)—"Did your mother know you took these goods?"

Prisoner—"No."

The Assessor—"Nor your father?"

Prisoner—"No."

The Assessor—"What end had you in view in taking them? (no answer.) What did you do with the money?"

Bailie M'Culloch—"Was it for the shows? I think I had better send her to prison for a couple of months. Very"——

The P. F.—"What amount did you get for them? What do you work at?"

The Assessor (explaining)—"Do you do anything?"

Captain Smart (who had just arrived, advising the bench)—"She's a bad girl, and should be sent to prison."

A witness was here called, whom we understood to be the mother of the prisoner.

The Assessor—"What age is she?" (looking towards the prisoner).

Witness—"Fifteen."

The Procurator-Fiscal—"A good deal more."

The Assessor—"She'll never see fifteen" (to prisoner), "What church do you attend?"

Prisoner—"The Catholic Church."

The Assessor—"Then we had better send you to prison."

Bailie M'Culloch—"You're found guilty on your own confession stealing from your father's house, confessing you did it intentionally; I'll send you 30 days to prison."

The Assessor—"You're sent to prison for 30 days."

Here we have the procurator fiscal contradicting his own witness as to a matter of fact, the assessor making up his mind to send a young girl to prison, seemingly only after being told that she goes to the Catholic Church; Captain Smart, whom we may call junior for the prosecution, usurping the duties of assessor by advising the Bench; and Bailie M'Culloch, after being thus well and ripely advised, coming to the conclusion that the panel is guilty of stealing, and of doing so intentionally, as if any one ever committed theft unintentionally or by accident!

The next case is one of assault. It is principally instructive for the elegant and very intelligible language in which the Bailie pronounces sentence. Here it is:—

John Robertson was charged with having, on Sunday morning, been the worse of liquor and disorderly in a house in M'Pherson Street, and with assaulting the proprietress of the house, and striking her on the head with a stick.

The Assessor—"What do you say to that, John?"

John made a lengthened statement, to the effect that he had been robbed of L.1, 12s. in the house, and had committed the assault in self-defence, when assaulted by four or five Herculean females of questionable reputation.

The Assessor—"Is that your defence?"

The Procurator-Fiscal—"His defence is this, that he did it in self-defence, and was not only attempted to be robbed, but actually robbed."

Mr Wright, agent for the defender—"That's the defence."

Bailie M'Culloch—(to prisoner)—"You're very cheap o't."

Prisoner—"Deed am I, sir."

Witnesses were examined who proved that John had come into this house—a low brothel—and had gone to bed, his "ladye-love" decamping while he slept. In the morning he awaked, and finding his money gone, began to "kick up a row," and, ultimately, struck the mistress of the establishment and cut her head considerably. The prosecutrix—if we may be allowed an expression peculiar to the Anglican courts—said a girl had been sent after twelve o'clock for whisky.

The Assessor—"Where did you get it?"

Witness—"I sent a girl to a club in the Saltmarket for it."

Bailie M'Culloch (with a look bordering upon the humorous)—"Are you a member of the club?" (An approving laugh from Captain Smart.)

Witness—"No." The prisoner struck me with the stick, and said he would murder me. He went towards the door.

The next witness said that the mistress herself went for the drink. The prisoner took the thick end of the stick.

The P. F.—"And used it as a hammer." (Laughter from the officials.)

After all the evidence had been led, the agent for the prisoner began to contend that the assault had been committed in self-defence.

Bailie M'Culloch—"Had it been proved in self-defence, the defence would be of some value. But it is not proved in self-defence, but because he was robbed, out of revenge he struck the woman. The man got into a den of blackguards, and had himself to blame."

Mr Wright—"The man's statement to me"——

The Assessor—"Speak to what's before us. We can't take the man's statement."

Mr Wright concluded by saying that the deed was done in self-defence, and that the money lost was a sufficient penalty.

After some whispering between the officials and the bench,

Bailie M'Culloch said—Well, John, this case is clearly brought against you, that you were guilty of disorderly conduct in that house, and well but—(on receiving a whispered suggestion from the Assessor)—disorderly conduct and assault. If you came to Glasgow, as you have already stated, and get drunk, and don't take care of getting yourself entrapped to get to a house of this kind. I regret very much these houses are so plentiful. We can't go anywhere without being attacked by these women. I hope I were able to punish them. Meas-time, I fine you 10s. 6d. or fifteen days. I hope it will be a warning to you."

In the following case a poor cabman seems to have been fined for an offence not charged against him:—

A cab-driver was charged with allowing his horse to gallop, and with driving furiously down Campbell Street. Cabbie laid the blame on the brechin. It transpired that he had not appeared when first cited, but had been brought to court. He pled, as an excuse, that he had gone to the country, expecting to return in time, but had been detained.

Bailie M'Culloch—"If you had come here as you ought to have done, according to the summons, you would have got the benefit of this case. I must say the court's not to be put about by you, besides, you are guilty of this furious driving, and I fine you 7s. 6d., or eight days."

From another case we gather that in the eyes of Bailie M'Culloch it is an aggravation of the offence of "drunk and disorderly," that the culprit is a stranger in the bibulous city:—

A travelling tinker and an itinerant umbrella-mender pleaded guilty to having been drunk and disorderly in Glassford Street. They were strangers.

Bailie M'Culloch—"We can't submit to this disorderly conduct on the streets, by any people, in this way, far less strangers. I fine you 7s. 6d., or eight days' imprisonment."

These illustrations surely speak for themselves, and we do not intend at present to offer any further comment on them. On reading the remarks of Bailie M'Culloch, we rushed for a copy of the Glasgow Directory. A reference to it explained the whole matter. This Solon of Glasgow retails tea and sugar in Argyle

Street! We conclude with one more case, as illustrative of the Bailie's own opinion of himself and brethren, and the horror with which he contemplates the Appellate Jurisdiction of the Justices of the Peace:—

James Smith, aged evidently about 17, was charged with assaulting and kicking a girl, of same age, in a whisky shop in High Street. The witnesses were three girls, aged respectively 13, 15, and 17, who testified to drinking ale with three boys in this shop.

Bailie McCulloch—"That man shouldn't have a license. You should see to this, Captain."

Captain Smart—"He lost his license, but got it again against my will."

Bailie McCulloch—"O these Justices of the Peace!"

The prisoner said his wages amounted to 15s. or L.1 a week, and he and the girls went whenever they had money to public houses and got drink.

Bailie McCulloch—"Well, you're guilty of this disorderly conduct—(the assessor prompting, "and assault")—and assault against this girl; so it's a warning to you. A guinea, or thirty days.

VALUATION APPEALS,

(*From Dumfries Courier.*)

Lord Benholme, as the Senior Lord Ordinary of the Court of Session, and Lord Armillan, as the Lord Ordinary in Exchequer, held a Court in Edinburgh on the 8th October, for the purpose of hearing appeals under the Valuation Act, from the various counties of Scotland. They sat under the powers conferred upon them by the second section of the Valuation of Lands (Scotland) Act, 20 and 21 Vict., cap. 58.

The Judges first determined that parties were entitled to appear by counsel. *Whether Money to be laid out in improvements is Rent?*—1. The first case taken up was one in which Mr and Mrs Murray Dunlop of Corsock had appealed from the valuation of a farm. The assessor valued the farm of Upper and Nether Glaisters, in the parish of Kirkpatrick Durham, at L.352, 4s. 6d.; and the object was to reduce this valuation to L.300. The Commissioners reduced the valuation to L.347, 4s. 6d. The facts were, that the rent stipulated was L.300; but the lease contained a provision to the effect that the proprietrix could expend L.1000 on the farm, for which the tenant was to pay interest at a rate of 5 per cent. The question was, whether such interest was to be regarded as "*rent*," or a return for money lent to the tenant. The landlord claimed any claim for interest on a part of the money expended on march fences, and that the whole sum payable annually by the tenant in consideration of the L.1000 to be laid out on the farm was L.47, 4s. 6d. Of the L.1000 there was expended L.200 for lime, which was laid on as a top dressing, and L.56 on sheep drains; the remainder being laid out upon permanent improvements in fences, draining, and houses. It was contended, on behalf of the proprietrix, that either in law nor according to the ordinary acceptance of the term, was any part of the interest on the L.1000 *rent*: none of the remedies peculiar to a landlord for the recovery of rent were applicable to it, and it was just the same as if the landlord had lent to the tenant L.1000 to stock his farm, or advanced him capital to cultivate it. The Judges did not adopt this argument, except so far as regards the lime and the money expended for sheep drains. They held, that the expenditure in reference to these two particulars ought properly to be made by the tenant. The top dressing from the lime created an immediate benefit enjoyed by the tenant himself, and the sheep drains being surface drains, required frequently to be renewed. The return paid, therefore,

for the expenditure as to lime and sheep drains were regarded by the judges not as rent, but as interest on money advanced to enable the tenant to cultivate the farm. The remainder of the expenditure, however, on permanent improvements, such as fences, houses, and drains, insured to the estate and increased its value; and although not in the strict sense of law *rent*, it must be taken to be so in the sense of the Valuation Act, the leading object of which was to ascertain the real value of land at the time in its actual state.

Another point arose upon the same case. By an agreement subsequent to the lease it was agreed that an additional L.100 should be laid out on houses, which sum was advanced by the landlord, and the tenant was bound to pay interest thereon at 5 per cent. The judges held this to fall under the principle of permanent improvements, and regarded the interest as rent in the sense of the Valuation Act.

The Commissioners had found that the interest paid on the whole L.1000 was to be regarded as rent, and refused to make any distinction as to the expenditure for lime and sheep drains. But they held that the interest upon the L.100 subsequently advanced, was not rent. From this statement the opinion of the Judges, which is in the following terms, will be understood:—

“We are of opinion that the determination of the Commissioners is right in regard to the L.800, deducting L.56 for sheep drains. That it is wrong as to the L.200 for lime. That it is wrong in regard to the L.100 expended on houses under the agreement of 1852.

(Signed) “H. J. ROBERTSON.
“JAB. CRAUFORD.”

II. *Woods must be Valued every Year, whether they return Revenue or not.*—The second case taken up was an appeal by the assessor against the Commissioners' judgment in favour of Mr and Mrs Dunlop. On the estate of Corsock there are certain woodlands, consisting of thirty-three acres of young plantations, and one and a-half acres of copse. The plantation and the copse yield no revenue, and are not as yet capable of yielding any, nor could any rent be obtained for them in their present state. The assessor, however, valued them as if they had been pasture, or grazing lands uncovered by wood, at L.36, 10s. The question in this case turned upon the construction to be put upon the 6th and 42d sections of the Valuation of Lands (Scotland) Act, 17 and 18 Vict., cap. 91. By the 6th section, it is provided, that “where such lands and heritages consist of wood, copse, and underwood, the yearly value of the same shall be taken to be the rent at which such lands and heritages might in their natural state be reasonably expected to let from year to year as *pasture or grazing lands*.” Had the statute said nothing more there would have been no difficulty in the case. The assessor would only have required to have estimated the value of the ground covered by wood, as if it had been a natural grazing; but then in turning to the interpretation clause (sec. 42) a rule is laid down as to the time when a valuation shall be made of wood. It is there declared, that the expression “Lands and heritages shall extend to and include wood, copse, and underwood, *from which revenue is actually derived*.” Therefore the meaning is, that wood, copse, and underwood, shall be valued as grazing land: but shall only be valued in the year when revenue is actually derived from it, and as no revenue was derived in this case, there can be no valuation.

Lord ARMILLAN—That is a startling conclusion. A wood may be only cut once in twenty years, and according to that reading it is only to be valued in that particular year, and then the valuation is to be taken not at the actual value which the wood brings, but at the value as if it were a natural grazing. That does not seem equitable or right. Mr Dunlop himself tried to get in Parliament these words about revenue struck out.

Lord BENHOLME—We must try and find a meaning for the word “Revenue” that will lead to results less inequitable and unjust. Does it not mean this? You are never to value woods where they can never make any return. But if at any time they will yield a return, then they are a subject for valuation.

Here it is not said that this wood is absolutely worthless, and will never in any future year yield anything. I must presume that it is a subject that will yield hereafter a substantial return. Well, then, revenue will be derived from it, and may be said "is derived from it," because the return which in a future year will be made, is partly the result of the growth of the present year.

Lord ARDMILLAN—It is a question of great difficulty; and I would like to see any way to reconcile the words of the 42d section with the manifest equity and justice of the case, which is in favour of a valuation. We will, however, consider the matter maturely, and deliver our judgment hereafter.

The Commissioners had exempted the woodlands from valuation, but the result, it will be seen from the following judgment, was to reverse:—

"We are of opinion that the determination of the Commissioners is wrong.

(Signed)

"H. J. ROBERTSON.

"JAS. CRAUFORD."

The next cases had reference to the mode of valuing

GRASS PARKS.

There were three appeals taken by the assessor with reference to the valuation of lands let as grass parks, in the cases of Mr Thomas Dickson of Malla-y and Crochmore, Mr Thomas Campbell of Lochfield, and Mr David Maitland of Barcaple.

Lord BENHOLME—This relates to grass parks that are let for a period of the year, for a few months of the year, for pasturing, from a certain term to a certain term, while, on the other hand, the proprietor has the occupation of the subject during the winter; and he has to keep it fenced, in order to hope to let it next year; and in that way, it is said, that what you call the rent of these parks, truly is the price of the crop, and not the rent of the land, properly speaking; and it includes remuneration for keeping up the fences, and other things of that kind, which in an ordinary lease the tenant would probably have to do himself. Are you to take that as simple rent, without considering that it is really more than rent—that it is the price of the crop? If you are to value the price of an arable land crop—oats or barley that are cut from it—that is much more than the rent of the land. There is not so great a difference here, because, except the keeping up of the fences, there is nothing that the landlord does for the land.

On behalf of the tenant it was contended, that the rents derived from parks let for seven months in the year could not be taken as the fair annual value of the farms, which were in the possession of the proprietor. The sum paid as rent represents more than the value of the ground. The proprietor top-dresses, and well conducted grass parks, generally once a year; he keeps up the fences; he keeps herds, and he keeps the ditches.

These are four things which he does every year—not merely the first year when he lays down the grass. Now, he does all these things besides giving the value of his land; and the money which he gets in return is payment, not merely for the use of the land—not merely for the grass, but for all these services, and for that expenditure. In this particular case of Mr Dickson, here is a farmer who has his land in his own occupation; he lets it out for seven months a year to graziers, who occupy it, and pay a rent which is generally fixed at an auction; and the question comes to be, shall you take the sum which is paid by these graziers as the rent of this particular subject? Now, the first question which arises is this: Are we within the 3d clause of the 6th section of the statute, which directs you to take the rent conditioned as the fair *annual* value? Observe what the 3d clause says—"Where such lands or heritages are *bona fide* let for a *yearly* rent conditioned as the fair *annual* value thereof, without reservation or consideration other than the rent, such rent shall be held and taken to be the *yearly* rent or value of such lands." And, proceeding on that clause, the valuator says—"The price to be paid by these graziers is the rent; you have

let this to them, and therefore I am within that clause of the section. Now, 1st, We are not within that clause; this is a case to be disposed of under the first clause of the section—a case of land unlet, and where we are to ascertain the annual value. We are not under a lease here at all. And why? Because the 3d clause speaks of lands which are let for a *yearly* rent, and it speaks of that as conditioned as the *annual* value, having reference to the case of *yearly* letting, and not having reference to a case like this, where there is a letting simply for a portion of the year. One can conceive cases where land might be let for a week or a month.

But suppose we are wrong in that, and suppose that you should hold that we are under that 3d clause, and that this is to be treated as a lease to these graziers, though the assessor has not so treated it, the question arises, What is the sum conditioned to be paid under these articles of roup? Rent is the return given for the use of the land, and nothing else. There is the bare naked soil, and from that the tenant is to raise his crops, and to make a profit from them. But if he gets more than the bare soil, then the price which he pays is over and above what is properly rent; and if it can be shown, that the tenant in the present case gave more for this land than for the mere use of the soil, then this is not rent. Now, a grass park is a peculiar thing. In the first place, the grass is not the natural grass; it is grass which is as much a crop as wheat is. The soil is ploughed, the grass is laid down on it, and during the first year it is totally unremunerative—it cannot be let at all. In the second year you get a crop off it; but the second year's crop won't pay for the expense, first, of the loss of a whole year's crop, and second, of the expense of labour. The second year's crop does not pay; and unless you take a third, a fourth, and a fifth year, this kind of farm management would never be remunerative. Therefore, in reality, this grass is a crop, and it is the very same case as if one had let out a field of turnips to be fed upon by sheep. The return which the grazier would give me for the use of that field of turnips to be fed on by his sheep, would be something more than the rent of the land; it would also be the value of the turnips. This is well described in the case of Mr Maitland of Barcaple:—"With the exception of two small fields of old grass (on one of which the appellant put liquid manure last winter, and on the other fed sheep with turnips, with a view to make these fields yield a good crop of grass for one year), all that let by the appellant was young grass laid down with the greatest care, part of it being first year's grass, and the rest being second, third, and fourth year's grass—being heavily manured with farm-yard manure, guano, and ground bones—the turnip crops having been fed off with sheep; and, in a number of cases, instead of taking a grain crop after turnips, which is the crop generally looked to for repaying the expense of a rotation of crops, the appellant again fallowed his fields after turnips, sowing them down in grass, with a mixture of the finest grass and clover seeds, partly imported by himself from the countries where they could be obtained of the finest quality. A crop of grass was obtained was at as great a cost as would have been one of wheat, and also at nearly the total loss of benefit from the fields for the year in which the grass was sown, so that the first crop was the return for two years' rent; but as it never could make such return, it was only in the hope that, under the management, the quality of the grass would remain longer good, and not soon require to be broken up and renewed by a course of similar cropping, the cost of which exceeds any profit derived from it. For these reasons, the appellant's grass which he let, was, he contended, an agricultural crop, quite as much as wheat, oats, or turnips; and had he eaten it off with his own cattle, the assessor admitted that the valuation of L.450 would have been right." That being in reality a crop produced by artificial means, and if your Lordships are satisfied of that fact, it is perfectly plain that this cannot be considered as rent. But, again, I have this other view to suggest to you. The statute here says that you are to look to the rent as the criterion of value; and observe the cautious words which are used—that it shall be taken to be the rent at which "such

lands and heritages might in their actual state be reasonably expected to let from year to year." That is the first part of the 6th section; and the third part is, "yearly rent conditioned as the fair annual value thereof." What use did the Legislature contemplate that a man should make of his lands and heritages? Is it such occasional use as the letting them out as grass parks? We know that that is a use to which land favourably situated may be applied; if it is on the highway, for example, to the English markets—if it is a good resting ground for cattle, you may get ten times more value for the occasional use of your land than you would by putting down on it the richest crops. But is that the kind of use the Legislature contemplated? No. The words there employed, "reasonably expected to let," mean the agricultural value of it.

Lord ARDMILLAN—I don't know that it is necessary for you to maintain that, because supposing you have a farm which, from its position—on the way to the English markets or otherwise—is sure to let well to graziers, if you brought that farm into the market, the tenant would take that element into consideration, and you would get a better rent for it, and that would be the rent that it would fairly bring. The point which I think is more in your favour is this—is not this use of the farm, by letting it to graziers, a use more appropriate to the farmer's management of the land than to the landlord's management of it, as holding the position of landlord? Suppose that, instead of letting it to a tenant in that way, he allowed parties to put booths upon it for the Falkirk Tryst, or to use it for a week in the year for a race-course, or for the erection of tents at the edge of a race-course, all these things would be elements that might make a tenant give a little more for it; but if a landlord chooses to do that for a week or a fortnight in a year, is that to be the value of it to the landlord? I don't think that is the use of it contemplated by the landlord. I think it is not the letting of the subject at all.

Lord BENHOLME—One may suppose a considerable variety of cases, which still, to my mind, are reducible to the same principle. You may put the case that, by very expensive management, you have got up a very valuable crop of first year's grass, for which you get a very large price. The second year you will not get so much; and if you were permanently to lay it down as a grass park for a course of years—twenty or thirty years—why, though the first year there is a considerable outlay, and it is more like a crop of turnips or oats when they are ripe, at every succeeding year there is less of that element. On the other hand, if you take the principle of valuing it as in the landlord's occupation at what it would naturally be expected to yield, why, the value which the assessor would give will approach every year to the rent of the park, and probably, at the end, it will be very nearly identical with it. But it leaves that margin that, whatever is the difference between this, say the fair annual value of the subject, and the price which the grazier gives as the price of the grass on it, that difference will be given effect to in the assessment. But the principle seems to me very much the same. I daresay on some grass parks, where there is very little to be done by the landlord, the rent which the grazier gives him will probably be very nearly the measure of the value of the subject.

Their Lordships took time to consider their judgment.

In each of these cases the Commissioners of Supply reduced the valuation to what was estimated to be the ordinary agricultural value of the respective lands; and their Lordships' judgment *affirms* that of the Commissioners. It is the same in each case, viz.:—

"We are of opinion that the determination of the Commissioners is right.

(Signed)

"H. J. ROBERTSON.

"JAS. CRAUFORD."

English Cases.

ASSURANCE—Memorandum Indorsed on Policy—Construction.—In consideration of a certain extra payment, permission was granted to a person whose life was assured, to reside abroad, in terms of the following memorandum endorsed on policy:—"Memorandum—Anchor Assurance Office, 67, Cheapside, June 23, 1853. The life assured under this policy being about to proceed to and reside at Belise, in the state of Honduras, and an extra premium of twenty guineas having been paid for the extra risk for such residence for one year, permission is hereby granted to the life assured to proceed to and reside at Belise aforesaid, and for the time aforesaid, and for so long thereafter, as the extra premium shall from time to time be paid along with the premium payable on this policy as within expressed. By order of the board of directors. (Signed) T. B., Sec." The "life" did not go to Belise till three years after—June 1856—and died there within a year after his arrival. The office resisted payment on account of the time that intervened before the permission to go abroad was acted on. But the Court gave judgment for plaintiff. Willes J.—"The intention of all parties was no doubt that the life assured should proceed in a reasonable time to Belise, but they have not expressed that intention in the memorandum; the defendants merely say that the life assured is about to proceed to Honduras, and then they go on expressly to say, that in consideration of twenty guineas paid, he shall have liberty to reside in Honduras twelve months. The question is, whether the words in the recital, that the life assured is about to proceed to Honduras, control the express words granting permission for the life assured to reside at Belise for twelve months. It would be an abuse of language to say it is so."—(*Notman v. Anchor Insurance Co.* 31 L. T. Rep. 202.)

PARTNERSHIP—Executors—Will—"Produce."—A partnership was entered into for five years by S. J. in 1853. By the terms of partnership it was agreed that five per cent. should be allowed on the balances of each partner at the end of each year before dividing the profits; that on the death of a partner during the term, his representative should take his share in the profits and capital until the end of the term, and the balance then due, by three quarterly payments, with L.5 per cent. on the balance remaining unpaid. S. J. died in Nov. 1856, after which profits were made and the partnership went on until the end of the term, S. J.'s capital and profits being left undisturbed by his trustees. By his will, S. J. directed his trustees to collect and convert into money such part of his personal estate as should not consist of money, and to invest the same, his wife being permitted to receive the income of such trust fund for life. The trustees were also authorised by the testator to postpone the sale, calling in, collection or conversion of any part of his real or personal estate as they thought fit, and to pay the rents, dividends, and "produce" of the same as the income of the money would have been payable had the sale or conversion taken place. *Held*—That the trustees took a saleable interest in the testator's share of the capital, the profits, interests, and balances; that the widow was entitled to interest and profits on her husband's share apportioned from the day of his death; to a proportionate part of the interest on the balance standing to his credit on the 30th June 1856 from his death till the end of that year; to the interest and profits on his share of the capital from Dec. 1856 until the end of the partnership term; to interest upon each instalment of the testator's capital paid by the surviving partners, and to any surplus with interest.—(*Johnston v. Moore*, 31 L. T. Rep. 353.)

REPARATION—Master and Servant.—Watson B., delivered judgment—This was an action to recover damages for an injury sustained by the plaintiff

the circumstances were these:—The plaintiff was a mine-sinker, and was, together with several other workmen, employed by the defendant in sinking coalpits in Lancashire. The plaintiff was at work at the bottom of the pit, and there assisted in filling a tub with water, which was drawn up to the top to be emptied, when, owing to something which occurred at the top, where his fellow-workmen were employed to empty it, the tub fell down the pit and injured the plaintiff. The cause was tried before my brother Byles at the Liverpool assizes, when a verdict was found for the plaintiff. A rule was obtained for a new trial, which has been argued before us. On the argument was admitted by the learned counsel for the plaintiff, that it has now been decided by all the courts in Westminster Hall, that a master is not responsible for an injury sustained by a servant for the mere negligence of a fellow-servant engaged in the same employment. The Court of Ex. Ch., in *Roberts v. Smith*, 11. and N. 213, has decided that it is the master's duty where he personally interferes to take care to provide that the tackle and apparatus employed by him is proper and secure, and that he is liable for damages caused by the want of due care in this respect. The same principle was laid down in *Person v. Wallace*, 1 M'Queen, 748, as existing in the law of Scotland; and was sought to bring the present case within that by two circumstances: the first was, that evidence was given that the hook by which the barrel was attached to the tackle which drew it up was not safe, and that there ought to have been a spring-hook on the inside, which would have prevented the misfortune which led to the accident. The answer to this seems to us to be, that the plaintiff himself knew that the hook which was used and worked by himself was not attached to the tub or barrel that afterwards fell upon him, and he seems to have made no observation or complaint in any respect about it.

We think that a servant so acting cannot maintain an action against his employer; he himself was contributory to the injury, as it is stated by Lord Abinger, in the House of Lords: "It is essential for the plaintiff or pursuer to establish that the injury arose from no rashness of his own." The second circumstance relied on was, that an apparatus called a giddy was not used. It was proved that the defendant had supplied a giddy for the purpose of being used on the top of the pit, where the tub was emptied by the workmen, and was used when coal or earth was brought up, but not water. It was proved that the defendant was in the habit of coming to the place where the pit was being sunk, several times daily. We think the defendant is not rendered liable by these circumstances. He had supplied a proper apparatus, and the plaintiff's fellow-workmen neglected to use it. There was no evidence that the defendant had given any directions to this effect; and it seems that to hold the defendant liable would be to utterly fritter away the rule that a master is not responsible for injury caused to one servant by the negligence of another. In the case of *Osce v. The Lancashire and Yorkshire Railway Company*, 3 H. and N. 734, this court expressed its opinion that extreme caution should be used not to relax the rule, and to this we adhere; and we therefore think this rule must be absolute for a new trial. I may make this remark, that if the parties think it worth their while, they may appeal from this judgment: it is a cause of great importance, no doubt, and if they think it right, though the court are unanimous in their judgment on the subject, the parties may have power to appeal. Rule absolute for a new trial, or leave to appeal given, if the parties desire.—(*Griffiths v. Gidlow*, 31 L. T. Rep. 300.)

MERCHANT SHIPPING.—A charter-party for a voyage from this country to Spain, stipulated "that this charter being concluded by B. for another party, the liability of the former in every respect, as well before as after the shipping, shall cease as soon as they have shipped the cargo." This stipulation was held to be good, and that B. was thereby absolved from liability for demurrage after the shipment of the cargo.—(*Oglesby v. Yglesias*, 31 L. T. Rep. 234.)

COPYRIGHT IN DESIGNS.—A deposit with the registrar of one of the articles itself to which the registered design is applied, instead of a copy of it on paper,

was held in *Norton v. Nicholls*, 31 L. T. Rep. 282, to be a sufficient compliance with the terms of the Act.

SUCCESSION DUTY.—A., by will, dated in 1821, devised certain estates to his brother B. for life, remainder to his nephew C. (son of B.) in tail, and died. Upon C.'s coming of age, in March 1848, B. and C. executed a disentailing deed, and vested the estates in trustees, subject to the joint appointment of B. and C. By a deed executed on the following day, the estates were appointed in trust (subject to an annuity of L.1000 to C. during the joint lives of B. and C.) to B. for life, with remainder to C. for life, and then to his sons in succession. On the death of B. in 1855, C. came into possession of the estates, and it was held a succession by C. under the will of A., and subject to a duty of L.3 per cent. It was also held that C. was not entitled to any allowance in respect of the L.1000. The case of *Re Micklethwaite*, 11 Ex. Rep., was distinguished.—(*Attorney-General v. Sibthorpe*, 31 L. T. Rep. 218.)

STOCK-JOBBER—Broker's Commission.—Defendant refused to pay commission to the broker he employed in making certain pretended contracts by way of gaining and wagering as to the differences in the future prices of railway shares on the ground that the claim was prohibited by implication of 8 and 9 Vict. c. 109. Judgment for the plaintiff.—(*Inchbald v. Cockrill*, 31 L. T. Rep. 205.)

LIBEL—Evidence of Malice.—Defendant, in a letter published in a newspaper in April 1857, charged plaintiff, according to the innuendo, with having maliciously damaged certain household furniture of the defendant. Defence—privileged communication—the letter being written in answer to one published in the same newspaper by plaintiff's son. Plaintiff, to prove express malice, called a witness, who swore that, on the Saturday night before the trial, and nine months after the publication of the letter, defendant had said plaintiff was a "d——d rascal—a dishonourable man, who had drawn and dishonoured bills." The court held that the evidence was properly admitted; but the judge should have called the attention of the jury to the length of time that had elapsed before the use of the expressions, and that they might have referred to something that had occurred since the publication of the libel. The not having been done, a new trial was granted.—(*Hemmings v. Gasson*, 31 L. T. Rep. 170.)

ASSIGNATION—Pension.—A major in the army entitled to a pension of L.1000, the grant of which bore that it was payable "until further orders." In consideration of a certain sum, he granted plaintiff an annuity, payable out of the pension quarterly, and assigned it in security. He also executed a power of attorney empowering plaintiff to receive the pension, and pay himself the annuity. After two payments, defendant revoked the power of attorney, by himself personally going to the War-office and receiving the pension. The defendant, in the usual manner, had received from the War-office a printed form of declaration which he was obliged to make upon each occasion when the payment of the pension became due; and at the bottom of the printed form was this memorandum:—"This allowance cannot be assigned as a security for a loan of money." On the motion for an injunction, it was contended that it would be a nugatory and absurd order, which would prevent the defendant receiving it on the one hand, and would not enable the plaintiff to receive it on the other. But V. C. Stuart said the court will, by injunction, restrain the defendant from receiving this pension, and will not permit this late officer of the army to do anything further to break a contract which he has deliberately made. The order will be to restrain the defendant from receiving this pension, and also from executing any power of attorney, authorising or permitting any other person except the plaintiff, to receive it.—(*Knight v. Bulkeley*, 31 L. T. Rep. 210.)

PERJURY—Proof of.—The defendant, who was a police-officer, laid an information against a publican for having his house open after eleven o'clock at night. At the hearing, however, of the information, he swore that he knew nothing of the matter, except what he had been told by another person. Held that he "did not see any person leave the defendant's house after eleven" on

the night in question. It was upon this last allegation that perjury was assigned, and in proof of its falsehood it was shown by the clerk to the magistrates, that when the defendant came to lay the information, he said he "had at night (the night in question) seen four men leave his (the publican's) house after eleven; that one of them he could swear to—it was Williamson—he knew him by his coat." Another witness deposed that upon a different occasion the defendant made the same statement to him. A third witness deposed to a similar statement, and it was also proved as a fact that Williamson and others did leave the house after eleven o'clock on the night in question. It was also proved that the defendant had offered the publican to settle it for L.1, saying he was risking perjury; and it was proved in addition that the defendant avowed he had received 10s. to smash the case, and was to have 10s. more. The prisoner was convicted upon the trial, but the question was reserved for the court above, whether or not the conviction was right. The objection to the conviction was, that the evidence of perjury consisted merely of proof of contradictory statements made at other times by the prisoner; and it was contended that this was not sufficient. The court, however, held that the proof was sufficient. Wightman J.—"It appears that the case may be put upon a very short ground, which is this—that in order to convict of perjury it is necessary that there should be two witnesses, for this obvious reason, that if there is but one oath against another oath, it is altogether in doubt which is true, and therefore two witnesses are required to contradict the oath on the ground of perjury. But it is not necessary, nor has it ever been held necessary, that there should be two independent witnesses to contradict the particular fact, there be two pieces of evidence—if I may so call it—in direct contradiction, thus: you have one piece of evidence of the defendant himself, who is proved to be one witness to have sworn directly the contrary on another occasion; that one would not do. When, in addition to that, you have the oath of another witness that that which he stated before was true, and therefore you have two witnesses, I ought rather to put it, that instead of two witnesses being necessary to prove each fact alleged as perjury and false, you must have the evidence of two persons giving evidence in contradiction to what has been sworn to by the defendant; one a witness who could prove, as in this case, that on some other occasion the defendant had stated that which was diametrically opposite to that which he had sworn, and you should have the other witness himself to give evidence of that which is directly opposite. You have, therefore, two contradictions; you have the contradiction of the defendant himself as deposed to on the one witness, and you have the contradiction of another independent witness who speaks to the falsehood of the fact. You, therefore, have two contradictions."—(*Reg. v. Hook*, 31 L. T. Rep. 221.)

PATENT—Infringement.—There is a patent for the production, by means of hydrate of lime, of a precipitate from sewage, which is sold as an agricultural manure. Parties using hydrate of lime for sanitary purposes are not guilty of an infringement. Lord Campbell, C. J.—It seems to me that this was a good patent, as the invention was for producing an article of commercial profit. But there was no evidence of an infringement by the defendants. They did not use the means patented for producing an article of profit, nor was an article of profit produced by them, but merely for purifying the water.—(*Higgs v. Woodwin*, 31 L. T. Rep. 196.)

SHIP—Lien for Repairs—Dock-hire.—Certain repairs were executed on a ship, which were not paid for; and the defendants kept the ship in a dry-dock. They now refused delivery—claiming a lien not only for the repairs, but for the dock-hire for each day she was so detained. Lord Campbell, J. C.—The defendants had a lien upon the ship for the amount of the sum due to them for these repairs; but we do not find any ground on which the claim can be supported, to be paid for the use of the dock while they detained the ship under the lien against the will of the owner. There is no evidence of any special contract for such a payment. There is great difficulty in supporting

it *ex contractu* or *ex delicto*. The owner of a chattle can hardly be supposed to have promised to pay for the detaining of the ship against his will. He is deprived of the use of it; and there seems no consideration for such a promise. Then the chattel can hardly be supposed to be wrongfully left in the possession of the artificer, when the owner has been prevented by the artificer from taking possession of it himself. If such a claim can be supported, it must constitute a debt from the owner to the artificer, for which an action might be maintained. When does that debt arise? And when is the action maintainable?—(*British Empire Shipping Company v. Soames*, 31 L. T. Rep. 196.)

USAGE OF TRADE—Evidence to Explain Contract.—Action for not accepting a quantity of palm oil, under the following bought-note: "Bought this day, by, etc., fifty tons of best palm oil, to arrive in Bristol from Africa, per the 'Chalco.' Wet, dirty, and inferior oil, if any, at a fair allowance; and if any difference should arise, the same to be settled by arbitration." At the trial before Crowder, J., at the Bristol spring assizes, it appeared that the defendant refused to accept the oil, on the ground that, out of eighty-seven casks, of which the fifty tons consisted, only seventeen answered the description of best palm oil, the remainder being of second, third, and fourth quality, for which the plaintiff had offered to make allowance. The plaintiff, to explain the contract, offered evidence of a custom in the trade, that owing to the uncertainty as to the quality of the oil, from the practice of mixing palm-nut oil with the palm oil abroad, a contract of this description was answered by a substantial portion of the oil being of first quality, and that according to such custom about one-fifth, as in the present case, would be regarded as such a substantial portion. The evidence was objected to on the part of the defendant, but was admitted by the learned judge, and the plaintiff had a verdict. A rule for a new trial having been obtained, on the ground that the evidence ought not to have been admitted, the court discharged the rule. *Erle, J.*—The evidence tendered is of persons conversant with the trade, to show what the meaning of the parties was. The evidence is not to contradict, nor to control, but to define what has been left undefined in the contract, and to explain what was ambiguous. This seems to me entirely within the principle laid down in *Brown v. Byrne*, in which a great number of authorities were cited; and, acting on that principle, I am of opinion that the evidence admitted by the learned judge at the trial was admissible.—(*Lucas v. Bristo*, 31 L. T. Rep. 214.)

BILL OF EXCHANGE—Non-Acceptance.—Plaintiffs agreed to sell, and defendants to buy, a cargo of oil, plaintiffs to ship the oil (free on board), defendants to pay on delivery of bills of lading, to be dated on the day of shipment. Oil was accordingly shipped, and bills of lading made payable to plaintiff's order. One of these bills for five tons was indorsed by plaintiffs specially to defendants, but, before tender, the ship and oil were lost. Notice had been given previous to the loss that the ship would bring five tons of oil for defendants, but no particular oil was appropriated. *Held*, per Pollock, C.B., Martin and Channell, B.B., that the plaintiffs, on shipping the oil, intended to perform their contract and deliver the oil "free on board;" that the property of the oil then passed from them to the defendants, and that an action would lie. *Held*, per Bramwell, B., that the above was a contract for the supply of unascertained chattels; that there had been no delivery or appropriation so as to vest the property in the oil in the defendants, and that plaintiffs had therefore no right of action. The seller in a contract for the supply of unascertained chattels, has no right of action until he has done an act which, by the agreement between him and the buyer, is to vest the property in the buyer, as by delivery to him, or to a carrier for him, of the goods corresponding with the contract, or till the seller has appropriated, or offered to appropriate and supply to the buyer certain chattels which corresponded with the contract.—(*Brown v. Hare*, 31 L. T. Rep. 354.)

THE

JOURNAL OF JURISPRUDENCE.

THE "EDINBURGH REVIEW" ON SCOTTISH LAW.

NOTHING can more illustrate the virtue of a name than the influence it possesses by the *Edinburgh Review*, in its present day of utter weakness and decline. One can more fully appreciate the spirit, vacuity, and intellectual ability of Jeffrey, by comparing the old volumes, which contain the history of literature during the thirty years when the periodical was under his superintendence, with the many dissertations that now appear under the old cover of the blue and yellow. Even yet the dead controversies of other days possess an interest altogether apart from the subject, in consequence of the flowing words and the brilliant rhetoric of the writer. Though posterity has not indorsed his judgment upon the Lake School, yet his later generation enjoys with as much relish the ridicule which excited so much attention and such bitter animosity, when it first appeared. When the *Review* afterwards came under the editorship of Napier, it no doubt was dull enough, but still the learned received instruction in its pages from many profound contributions by Sir William Hamilton ; and now and then there appeared some of those flowing articles by Macaulay which have taken a permanent place in English literature. The great articles on Bacon, Clive, and Hastings, kept up the prestige of the *Review*. In Empson's time it did not improve, though he gave to the world his own admirable article on Dr Arnold, and though Jeffrey then wrote his last literary contribution, in the article on Watt and Cavendish. It has been reserved, however, to the present management to exhibit to the world the anomaly of one of the dullest periodicals now published in Europe with one of the largest circulations ; and in proof of that assertion, we point to the last number, which, from beginning to end, contains reading only about as interesting as an accountant's report. The writers seem to be a class of men who live altogether apart from the contemporary generation, and are interested in subjects that have

no interest for their neighbours. The very first article—which, of course, as occupying the most prominent place, is understood to be the best—gives, in a languid way, half in text and half in notes, the most painfully minute account of the Rise and Fall of the Ministries of George the Third and George the Fourth, all of which has long ago been duly entombed in history, and about which not even an old Tory or an old Whig could get up the slightest interest. Indeed, the best comment on the article is furnished at page 412 of the same number of the *Review*, in these words:—"The attempt to excite any lively interest in posterity by the description, however ingenious, of the movements of political parties long defunct, is altogether hopeless."

But it is not either our province or our intention to review the *Edinburgh*. An article on Scotch Law, however, devoted to an exposition of the differences between the criminal law of England and Scotland, has found its way into the last number. It is evidently from the pen of a Scottish lawyer; and, as a matter of literary composition, it is worthy of better companionship. It is disfigured by some exaggeration and a few errors,—advocates a number of antiquated opinions which had long been gathered into the limbo of oblivion, and is therefore deserving of a passing notice in a journal devoted to Scottish law.

With the view of stating startling contrasts, the writer makes two errors in the first ten lines of his article:—"What is bigamy," he says, "in one country, owing to the non-recognition by the English courts of a Scotch divorce, in the case of an English marriage, may be a lawful second marriage in the other." This statement is thus far incorrect that the English courts, do not refuse to recognise a Scotch divorce of an English marriage, where the parties have acquired a Scottish domicile. They refuse merely to recognise divorces (if such are ever granted) where English parties cross the border, and, after remaining in Scotland forty days, seek the remedy of the Scotch divorce.

"In England," continues the reviewer, "it is impossible to perpetuate an entail by the mere force of a deed of settlement; in Scotland, there are entails which cannot be broken except by Act of Parliament." Where has the writer been for the last ten years? Who is he? If he be a practising counsel, he is a most unsafe adviser on entail law. We beg to inform him, that since the year 1848, *any* entail in Scotland can be extinguished by the heir in possession, with the consents of the immediate heirs.

Again, we have a repetition of the statement which, when it came from the late Lord Advocate in the House of Commons, took the profession and the public with surprise:—"In all cases the information or complaint to the procurator-fiscal, by the express direction of the statute of Anne in 1701, must be in writing, and signed by the party making it, *without which a suspected person cannot be arrested.*" Suppose that you and I, my friend, were too idle, or cared more for

our own practice than for the good of the public, and would not take the trouble to lodge the information (having a wholesome dread of an action of damages besides), can no one move the wheels of justice? If there be no informer, must the thief or murderer get free? Cannot the procurator-fiscal himself at once apply for his warrant to arrest, on the call of public rumour, and on his own conviction of the propriety of the step? We regret to see, from his ignorance on this point, that the writer has never had the good fortune to draw the salary (payable quarterly) of an advocate-depute. Of course he is a Whig, writing as he does in the *Edinburgh*, and must therefore live in hope. Let him keep in good heart! The Reform Bill is coming, and the present officials have only two more quarterly salaries to draw.

And O! my learned brother, what sad blunders you do make about matters known to all of us from our schoolboy days. Why do you give the noble Act of 1701 to Anne, when it appertains to him of the Glorious and Immortal Memory!

And why do you increase the dense ignorance of the Sassenachs as to our laws, by actually telling them that "sometimes prosecutions (in the criminal courts) by *private parties* take place?" Did any man of this generation ever hear of such a thing? Of course it is *competent*, with the concurrence of a certain learned Lord; and we all know that it is so stated in Hume. But so also are Letters of Four Forms and Letters of Slaines mentioned in Erskine; but, to the living persons of our days, the privilege of actual inspection of these things has been cruelly denied.

Of course we sympathise with the writer of an article. In the fever of "piling up the agony" of his eloquence, nothing can be more irksome to a reviewer than to be obliged to refer to an *Encyclopædia* for a date. The pen records the first impression, and when the proofs are revised, the attention is dull, and the blunder remains as food for the scoffer. Let us therefore have compassion on human infirmity, and come at once to the consideration of three great questions upon which the reviewer has pronounced, in wavering accents, and with an uncertain sound.

He is in favour of coroners' inquests. He thinks our system is all wrong, in so far as it does not recognise the public examination of the dead body by twelve jurors, and refuses to acknowledge wisdom in the speeches of Mr Coroner Wakley. Murderers escape detection and punishment, in consequence of the languid administration of justice, where a procurator-fiscal takes the initiative. Call him a coroner, and give him the assistance of twelve shopkeepers, who know as much of the rules of evidence as of the rules of algebra, and the result would be different. Crime would not then walk away undetected, nor justice be unavenged. The age of gold would return, and the sun of Scotland's glory would not be culminating to the realms of Pluto and Old Night.

Has the writer been buried during the last twenty years in so pro-

found a sleep that he has taken no note of what has actually been done in Scotland in reference to this matter, nor of the theories and the practical experience of the present practical generation of Englishmen? At the very time when the English people propose the abolition of the coroner's inquest, he thinks it proper to offer it to us. While the English lawyers, at social science associations, desiderate the extinction of Quarter and Petty Sessions, and grand juries, and the coroner's inquest, with the view of handing their powers over to a trained legal bloodhound, our reviewer finds beauties in them all, and wishes the inquest transplanted to the north.

The subject is too large for discussion at present, even if the day for discussion yet existed. That, however, has long gone by; and in the midst of the pressing exigencies of the moment, we cannot afford time to discuss the probability of a coroner's inquest being introduced into Scotland, any more than the famed question as to the precise position of the walls of Troy. The reviewer confounds two things: *first*, the person whose duty it is to make inquiry into supposed crime, with, *secondly*, the mode in which he does it. A professional agent, called the procurator-fiscal,—equal to a coroner, better than a jury,—is entrusted with the function; but he precognosces *in secret*. If the argument were confined merely to establish the propriety of an open investigation, there are many to whom it would commend itself, and whose prejudices against the system take their origin in hatred of this part of it.

It is, however, quite unnecessary to discuss the theory of coroner's inquests, or the question of the propriety of its introduction into Scotland. The true answer to all the arguments of the reviewer is found in the *fact*, that there exists in Scotland, at the present day, a rule as to inquiry into cases of sudden death far more effective than the English inquest. Of course, the reviewer, who relies upon information obtained from books, or from the college study of years ago, was unacquainted with this fact, and has therefore done injustice to his country and its laws. For his information, we print in a note the General Order issued by the Lord Advocate to all procurators-fiscal in Scotland as to cases of sudden death, and which, we submit, will render necessary a note to the next number of the *Edinburgh*, correcting the erroneous impression which the incautious statements of the reviewer are calculated to give as to Scotch law.¹

¹ GENERAL ORDER BY THE LORD ADVOCATE TO PROCURATORS-FISCAL OF COUNTIES AND BURGHES.

1. In all cases of death from accident, which shall come to the knowledge of the Procurator-Fiscal, through reports by the Police, or otherwise, it shall be his duty to make inquiry, or, if deemed advisable by him, to take a precognition, relative to the facts connected with the accident and the death of the individual; and wherever, in his opinion, a written Medical Report as to the cause of death shall be necessary for the due consideration of the case, he shall also obtain such a Report from a qualified Medical Practitioner.

2. In all cases of sudden death which shall come to the knowledge of the Pro-

The Reviewer is at one time in favour, and another, against the interrogation of the accused at a trial. He abuses the French judges for practising the system, and yet concludes with an argument in its favour. There is not, he says, the slightest fear of its being abused. This "is to the last degree unlikely to be the case at a trial presided over by a humane and enlightened judge, bent only on discovering the truth, and more anxious that the innocent should escape than that the guilty should suffer." Amiable sweetness! Innocent simplicity! Of course all judges are enlightened, which we take as a presumption both of law and fact. As to their *humanity*, we of course admit that they would not hang a man, nor stick pins into his legs, unless they believed the wretch deserved it. But a judge may have a bad digestion, and his biliary secretions may be all wrong, and then he is *ferox et incapax*, just like the great Emperor who in like circumstances lost the battle of Leipsic. But surely it is unnecessary to argue seriously the point raised by the Reviewer as to giving power to a judge to argue with, scold, apostrophise, and bully an unhappy prisoner at the bar. In this country, and in our day, this modification of the torture of the middle ages is so utterly alien to all our notions of law and justice, and only to be acquiesced in by a free people when they have lost all power in the legislation of their country, that we must decline to enter on a controversy so absurd and idle.

curator-Fiscal, through reports by the Police, or otherwise, it shall be his duty to make inquiry, or, if deemed advisable by him, to take a precognition, relative to the cause of death; and wherever, in his opinion, a written Medical Report is necessary for the due consideration of the case, he shall also obtain such a Report from a qualified Medical Practitioner.

3. In all cases where the discovery of a dead body shall come to the knowledge of the Procurator-Fiscal, through reports by the Police, or otherwise, it shall be his duty to obtain from a qualified Medical Practitioner a written Report relative to the cause of death; and he shall also make such further inquiry, or, if deemed advisable by him, take such a precognition, in regard to the facts connected with the discovery of the body and the death of the individual, as may be necessary for the due consideration of the case.

4. In all cases of suicide or sudden death of any prisoner or person in custody, which shall be reported to, or otherwise come to the knowledge of, the Procurator-Fiscal, it shall be his duty to obtain from a qualified Medical Practitioner, a written report relative to the cause of death; and he shall also make such further inquiry, or, if deemed advisable by him, take such a precognition, as to the facts connected with the occurrence, as may be necessary for the due consideration of the case.

5. The proceedings taken in carrying out the foregoing instructions shall, in every case, be reported in ordinary course to the Crown Agent by the Procurator-Fiscal charged with their execution.

6. In all cases in which the Procurator-Fiscal has instituted an inquiry and made a report relative to the death of an individual, he will, in the first instance, fill up the form or schedule which has been furnished by the Sheriffs, and transmit the same with a report to the Crown Agent; and he will in no case make any communication to the Registrar on the subject until he has obtained the approbation of Crown Counsel to the schedule as filled up by him, or directions as to the course to be followed. He will thereafter transmit the schedule to the Registrar, completed in the terms approved by Counsel.

It is not creditable to the Reviewer that, while wasting much of his space on this point, he omitted to notice, and give the influence of the *Edinburgh Review* to the true remedy for the evils he deploras. Why, he asks, conceal guilt if you can get it from the confession of the accused? Why, on the other hand, we ask, debar innocence of its defence? Long, long ago, when the Reviewer was in the heyday and freshness of his spring, he has appealed to an astonished jury for mercy to his client. Convinced of the innocence of "the unhappy young man at the bar," he is unable to carry the jury to the same conclusion, in consequence of the common want—the want of evidence. No one saw the thing done but the prejudiced and partizan witnesses,—and the accused. The prisoner's mouth is shut. He who, of the whole world, knows the story best, is not allowed to speak. His counsel cannot tell his story—cannot give the explanations of doubtful facts, which could not be extracted from hostile witnesses on cross-examination. Often and often must the Reviewer (as the writer hereof, and all the benefactors of their species who give to persecuted and prosecuted humanity the benefit of their assistance in the criminal courts) have felt himself in fetters from want of the best of all evidence—the evidence of the prisoner. Why not let the poor man give his evidence on oath? Let the jury believe it or not, as they like. Let them hear it, and decide between the hostile witness and the accused. But, no! The party in a criminal trial cannot be a witness. This last remnant of the barbarous jurisprudence of the middle ages yet exists; and we appeal now to the members for Leith and Greenock to link their names to history by carrying through the great reform, of rendering the accused a competent witness,—*when he tenders himself*. Beyond this let us not proceed. Let the man conscious of guilt remain in silence, if he please. Do not force him to speak, but give him the privilege, if he wishes it, to explain or answer the circumstances under which suspicion attaches itself to him.

The writer in the *Review* then favours us with his opinions, which are neither very new nor very striking, on the working of jury trial. Of course, he, like all sensible men, protests against the law requiring juries to be unanimous. But the objections to jury trial in Scotland, though they embrace this, extend farther. The qualification of the juror is by far too low. The great mass of them are small shopkeepers, lodging-house keepers, artizans, or farmers. All the members of the learned professions are exempted; all the men who are accustomed to read or reflect—the men whose business it is to think—are freed from the duty of a juror, for whose office accuracy of thinking is the principal requisite. How insane is it to put our present set of jurors in a position where, without capacity for it, they are called upon to discharge the most delicate and difficult duties of civil life! The whole extent of many a farmer's reading consists in the study of his weekly newspaper, and a chap-

or two of the Bible on a Sunday. Accustomed all the week to be open air, to country operations, and manual labour; his ideas confined to the simplest of all possible kinds of abstract notions—the greatest being the calculation of the price of grain he may have sold; daily exercise being as necessary to him as his daily food, and thinking being as abhorrent to his disposition as it is prejudicial to his health,—the unhappy farmer is, on some unlucky morning, summoned to sit in judgment as a juror. He enters a stated court, and takes his seat in the box. The counsel for the pursuer begins his speech, seasoned in the usual way for the capacity of the tribunal addressed; the farmer listens for half an hour, perhaps a whole one, and then begins to feel the miseries of his new position. Cooped up in a narrow seat, with no way to stretch himself, his head becomes heavy; his notion of the case gets gradually dimmer, and, amid confused visions of his cattle and his fields, he listens to, but understands not, the long oration of the advocate. Four hours pass on—six, seven, eight, or ten—enough to exhaust the patience and to deaden the energy of men the most accustomed to intellectual labour, and hardened to confinement in a cramped position in crowded courts; and, of course, far more than enough, to lay prostrate, for any useful purpose of patient judgment, the little glimmering intellectual capacity of our worthy farmer. It is worse than idle to send the most respectable person into the jury-room “to consult about a verdict.” Can it be said that any one of the class will have more than the most broken and disjointed impressions of a case, on the decision of which one’s fortune or good name may rest? Can he have sufficient vigour of mind, after such a lengthened sitting, to view the evidence, and give effect to reasoning in opposition to clamour or invective? Sleepy, wearied, and indifferent, what’s Hecuba to him or he to Hecuba? He will say “yes” or “no” to get rid of the stocks in which he is confined; and when a little, weary, voluble juror, engaged all week in selling spirits over the counter, and who, being used to confinement, is fresh and vigorous, proclaims with sharp and decisive energy that he is quite clear the defender is a rogue and the pursuer an honest man, and that the latter must have a verdict, the whole of the rest raise their voice in chorus, and take refuge in the decision of character of, perhaps, the smallest item among them. The verdict, instead of being the judgment of twelve independent minds, is generally that of the most positive unit, who has got most impudence and the longest tongue.

We do not mean to resume what we have often written as to the uselessness of juries to decide upon crimes, where the Crown is the prosecutor and the accused a private citizen. There, the system has worked well, and a rough and round verdict sufficiently answers the purpose of criminal justice. It is far different, however, when we must decide a question of private right. No principles of approximation to a true decision can be listened to. If exact and

scrupulous justice be not administered, the consequence is a cruel wrong inflicted on one of the parties to the suit. In leaning towards A, injustice is done to B. The most delicate accuracy, the most sagacious estimate of motive, the most laborious balancing of discordant proof, the cool head and steady judgment, are the required qualifications of any man or set of men who are invested with the office of trying an issue dependent on the conflicting elements of human testimony, in regard to an involved transaction of civil right. Can it be said with truth that these are the qualifications of jurors dragged from the plough, or excavated from the obscurity of small shopkeeping? Would this humble, uneducated class of men be selected by any one enjoying the ordinary share of reason to be the umpires in a question requiring skill, delicacy, and tact? Would you consider a man accustomed to the free motion of his limbs engaged in a trade in which he seldom sits, or where he is always in the open air, to be anywise peculiarly fitted for a patient consideration of a question relating to your own private affairs, if you tortured him, before he gave his judgment, by keeping him for hours in a constrained position, as painful to him as if he were in the stocks? A man unaccustomed to surgical operations is surely not the man whom you would allow to operate upon a fracture in your leg. And yet with equal folly have we a law, which declares a person who may not be able to read or write, of whose judgment or honesty we know nothing, who may have never elevated his ideas beyond the price of eggs and butter, to be still not merely a competent, but the best judge of the most involved contracts, and to possess the most accurate powers of discrimination into the value of evidence.

Bad as they are, however, they are better than the judges would be. They have one great merit over the latter—they do not, in general, *know the parties*. They have no personal likings to agents or counsel. If they go wrong, as they often do, they blunder in ignorance, and their error, though provoking, is without a sting. The real remedy is to elevate the qualification—to make no exemptions from service—to compel all professional men of every class (with the exception of judges) to serve on *civil cases*—and to provide that upon every jury there shall at least be five special jurors. You would in this way get intelligence into the jury-box, and men accustomed to the confinement which every trial involves.

As to the unanimity of jurors (which is required still, under certain modifications made by Dunlop's Act), the matter is now past argument. When Lord Grenville, in 1806, first proposed the introduction of jury trial in civil cases into this country, his scheme was that the jury should consist of fifteen, and decide, as in criminal cases, by the vote of a majority. This proposal was defeated in 1815; and the English system of making the jury consist of twelve, and to be unanimous, was adopted. It was the rule in England.

and that was enough; and no man accustomed to the practice of the courts is without his sarcastic anecdote or his joke about its working. It operates in this way. A jury of twelve men, with very differently constituted understandings, are set down to the disposal of a case of "resting owing" on an ordinary contract of work and labour done. On the one side evidence is led to show that L.1000 is due; on the other, that nothing is payable. One of the jurors has been convinced that the evidence on the latter point is conclusive, and he will not yield to the opinion of the other eleven, who think that L.1000 should be given. Not being able to agree, the judge may confine the jury for twelve hours, unless nine jurors (after sitting six hours) agree to a verdict; but this not being agreeable to the gentlemen of the majority, they effect a compromise with the dissenting unit, and bring in a verdict for L.300—a verdict intelligible on no view of the evidence, and which to one of the parties is flagrantly dishonest.

At no time did this rule hamper the criminal law of Scotland, and we have never heard of any inconvenience resulting from the vote of a majority. Were such a vote not permitted, it must be obvious to any one who has attended our criminal assizes that many of the convicted felons, who carry their histories to our penal settlements, would still be flourishing among us as examples of the working of the over-scrupulous consciences which an active minority in almost every Scottish jury exhibits.

The Act of Mr Dunlop went a certain length in the right direction, but not far enough; and the time has now arrived for an improvement, which, we suggest, should be to allow a majority of nine to return a verdict, after one hour's seclusion, and to discharge the jury after three hours, if nine have been unable to come to a verdict.

THE LIABILITIES OF DIRECTORS.

TILL the various cases on this subject, now in Court, are finally determined, no class of questions can be more interesting than the rights and liabilities of shareholders. In our last number, we offered some observations, explanatory of the course taken by the English Courts of Equity, where a party is entrapped into becoming a shareholder by the misrepresentations of directors acting in name of the company. Where fraudulent reports are put forth by the directors and adopted by the company, for the express purpose of inducing persons to become shareholders, the person so deceived is exempted from liability. The case is treated as if one were inveigled into an ordinary trading firm by false statements as to its solvency and the quality of the investment: the fraud, on the faith of which the contract proceeded, makes it no contract at all, and

frees the shareholder from all responsibility. But it is to be observed, that this is a question falling under the rights of shareholders *inter se*. The body corporate are all liable to the creditors of the concern who, contracting with a company as a corporation, have nothing to do with matters occurring within the corporation. These are concealed below the surface which is presented to the public. The misrepresentation acted on, must therefore be the misrepresentation of the company; that is to say, the report and proceedings of the directors must have been adopted by the company as its own; and, moreover, the party seeking exemption must have bought in on the faith of the misrepresentation. In the ordinary intercourse of the Stock Exchange, it will always be difficult to find a case to satisfy these requirements. If the purchase is made from the company directly, or from agents sent round the country to puff and canvass for the concern, the right of the shareholder to be freed is tolerably clear. But if the purchase is made from a shareholder, the right to exemption is not so apparent. The M. R. decided against a shareholder in the Liverpool Borough Bank, who purchased from an existing shareholder on the faith of the report published in July 1857, and did not discover the fraud till after the Bank stopped (Duranty's case, Nov. 20, 1858). So, too, where a shareholder sought exemption on the ground, *inter alia*, that the accounts were falsified, and 7 per cent. had been divided when the concern was insolvent, the Vice-Chancellor refused to strike his name off the list of contributories, because it did not appear that he had ever read a syllable of the reports, or that he was induced to suppose they were true,—still less that it was by reason of the misrepresentations therein contained that he was induced to join the concern (Bigge's case, V. C. Kindersley, Nov. 15, 1858; 7 W. R. 30). Further, it would appear that, following the rule adopted in all cases of fraud, the relief may be barred by time and acquiescence. A person who, without inquiry, goes on, year after year, drawing dividend after dividend, be they fictitious or no, has no right to be exempted, seeing that he had time to ascertain the true state of affairs for his own satisfaction. "Paying dividends out of capital (says the M. R.) is no doubt a gross fraud, and it is a fraud which entitles a person taking shares in consequence thereof to say that he is not a shareholder." But he adds, in a case where this was pleaded by a shareholder of twenty years' standing, the lapse of time is an answer to the plea: it is impossible he can be allowed to go on so long as they pay dividends, and then, after they cease to do so, to inquire whether it was a fraudulent transaction or not. "Observe (he asks) what this would lead to. Persons would buy shares in every company they found paying high dividends; would carefully avoid making any inquiry as long as they paid those high dividends; would go on receiving those high dividends as long as they paid them, and the moment they failed to do so, would turn round and say, I repudiate the whole transaction. It is impossible,

in my opinion, that the Court can come to such a conclusion as that. It is, in my opinion, directly opposed to all the principles of equity, and to the mode in which this Court deals with all those cases of fraud. Suppose this company had turned out exceedingly profitable, would not this gentleman have remained a member, and would anybody have said he was not a member? And yet, if you follow him, twenty years afterwards, to say, all this was a fraud in the first instance, and I have not discovered it till now (which I assume to be the case), simply for this reason, that as long as you paid me a good dividend I did not think it necessary to make inquiry,—the Court would arrive at a conclusion of the most dangerous description, and at a conclusion which would tend to destroy the means of carrying on commercial intercourse as between man and man, and destroy all confidence in the conduct of mercantile transactions.”—(*Leatherdale's case*, reported Sol. J1. Nov. 6, 1858.)

But a question which is likely to affect a more numerous class of cases, is the right of action against the directors. A shareholder may fail to have his name struck off the list of contributories, and yet have a good claim against the person or persons by whose representations his responsibilities have been incurred. The misrepresentation may be made by the seller himself, by a director in his individual character, or by the directors as a body. In every case, the party using the misrepresentation, and inducing another to act on it, is, in the buying and selling of stock, just as in any other transaction, liable to the party deceived for the consequences of the deceit.

This simple principle opens up questions which, in the present circumstances of the country, are of an entirely new, and, at the same time, most momentous character. Till lately, a seat at the board of a joint-stock company was a situation much coveted and highly prized. It gave the fortunate owner a position in society, it was a passport of respectability, and it was the legitimate reward of being rich, and fortunate in business—or rather, perhaps, of the shrewd sagacity which had marked a long life in commercial pursuits. The duties, too, were light, and the responsibility nominal. The concern was highly prosperous—paid large returns—was firm as a rock; and, at the weekly meeting, a ten minutes' chat with the manager, and a cursory examination of a tabulated statement, without details, were not matters involving any great labour or anxiety. Such was directorial management; and for the lamentable consequences of it, it is now sought to make these wealthy and highly respectable gentlemen responsible. Unhappily, they cannot pretend innocence; for neglect of duty is often as injurious, and is always as unjustifiable, as its positive violation.

Two grounds of redress seem to be open to a ruined shareholder. He may bring an action for the losses he has sustained through reckless mismanagement and betrayal of trust; or he may sue for the loss he has suffered through the false statements contained in

the directors' reports as to the condition of the concern. The former case is a case of circumstances. An example will be found in one branch of the Aberdeen Bank case of the present year. The latter is a question of comparatively new impression; and to it we shall, for the present, confine ourselves. The pursuer must make out—

1. That the representation was false;
2. That it was false in the knowledge of the defender;
3. That it was used with the intention of being acted upon;
4. That it was so acted upon; and,
5. That the damage sued for was the result thereof.

Here the only point which requires elucidation, is as to the fact of knowledge at the time of the deceit. Misrepresentation may found an action either in respect of breach of warranty, or on the ground of fraud. In the former case, the party seeks damages for the non-implement of a contract—the defender having promised, at the time of making the bargain, that so and so would be the case. It is therefore immaterial whether the defender is or is not aware that his undertaking is contrary to the fact; enough that the promise was made, and that it has not been fulfilled. But where the action is grounded on the fact that the pursuer was *deceived*, its foundation, being raised irrespective of warranty, must be something more than mere falsehood. The statement must be both false and fraudulent; that is to say, it must be false in the knowledge of the defender, and told with the intention that the pursuer should act upon it. Hence in every case, almost, the sole question is, whether the *scienter*, as English lawyers term it, has been sufficiently established.

Now, there are three classes of circumstances in which a person may deceive another by means of a statement contrary to the fact.

1. When the party did not know it to be false, and had no intention to deceive.
2. When he really knew that it was not true.
3. When he did not know it to be untrue, but did *not* know it to be true.

The first case is the simple telling of a lie, which, as we have said, gives no right of action. The principle established by *Pauley v. Freeman* (3 T. R. 51, Sm. L. C.) is, that if the statement was false in the knowledge of the defendant, and told with the intention that it should be acted on, and plaintiff does so in the belief that it is true, the latter has a good claim for the damage which is the result. It is not necessary that there should be anything of the nature of fraudulent intent in a criminal sense; i.e., it is not necessary to prove that there was either a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff (*Forbes v. Charles*, 7 Bing 105, Per Tindal, C. J.). While, therefore, it is laid down, that to support such an action both fraud and falsehood must concur (Per Gibbs, C. J., in *Ashlin v. White*, Holt 387), the fraud here spoken of must be understood as “fraud in law,” which is said to consist in “knowingly asserting that which is false in fact.

the injury of another" (Per Cresswell, J., in *Cranshay*, 4 M. & Gr. 387).

The meaning of this will be best understood from a consideration of *Polhill v. Walter*, 3 Barn and A. 114. A foreign bill of exchange was drawn on a person H, and the defendant W, when it was presented at H's office, falsely asserted that he had authority to accept by procuration. It subsequently was indorsed over to different parties in succession; and the plaintiff, relying on the genuineness of the acceptance, received it from the last indorsee in payment of a debt. In an action brought by him against W for deceitfully pretending that he had authority to accept, it appeared that, though he had no such authority, he had no doubt that the acceptance would be ratified; and the jury, therefore, negatived the idea of fraud. But the Court held that, to make the defendant liable, it was enough that he had made a representation which was untrue, and which was intended at the time, or, from the mode in which it was made, was calculated, to induce another to act on the faith of it. "Here the representation," said the Court, "is made to all to whom the bill may be presented in course of circulation, and is, in fact, intended to be made to all, and the plaintiff is one of these. The defendant must be taken to have intended that all such persons should give credit to the acceptance, and thereby act on the faith of that representation, because that, in the ordinary course of business, is a natural and necessary result." In this case, the misrepresentation consisted in the statement that the defendant had authority, when he had no such authority. He knew it was untrue. If, however, instead of assuming that his acceptance would be subsequently ratified, he had had good reason to believe that his representation was true,—*e. g.*, if he had received a mandate or letter of attorney signed, which he believed to be genuine,—he would have been free from blame, and relieved of all responsibility. So, if he had examined in a memorandum that he accepted without authority, but on the belief that it would be ratified, there would have been no liability incurred; but in this last case, as is pointed out in the judgment, there would have been no real acceptance.

But, further, it is not even necessary, in order to infer liability, that the party sought to be charged knew the deceit to be untrue. A man ventures to speak of that of which he has no knowledge, and takes upon himself the responsibility. While he does not know the fact to be positively untrue, he does not know it to be true; and, therefore, if injury results to another from his warranting as trustworthy that which is afterwards found not to be so, he is liable in the consequences. The law is stated thus by Mr Baron Parke: "It is not necessary to show that the defendant knew the fact to be untrue; if he states a fact to be true for a fraudulent purpose, he at the same time *not believing* that fact to be true, in that case it would be both a moral and a legal fraud." This was applied in *Taylor v. Ashton*, 11 M. and W. 401, which was an

action rested on the publication of delusive reports by a banking company—the concern being represented as being a profitable undertaking, paying a large dividend, and a good investment, when truly the whole affair was insolvent. The plaintiff having established that it was by means of these false reports that he was induced to purchase shares, he was found entitled to recover. So in *Evans v. Edmonds*, 13 C. B. 775, the law was most clearly enunciated. It was an action on a deed whereby the defendant granted an annuity to the plaintiff, as trustee for his wife, in ignorance of the fact, that she and the latter had for some time been carrying on an adulterous intercourse, whereas plaintiff had represented that she was a virtuous person, entitled to maintenance. “I do not say,” says Maule, J., “that to constitute such a fraud as would avoid the deed, it would be necessary to show that the plaintiff knew, at the time he made the representation, that the wife was unchaste. Because I conceive, if a man, having no knowledge on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of fraud, for he takes upon himself to warrant his own belief of the truth of that which he asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraudulently made.”

There are numerous examples of the application of these principles in actions brought by subscribers to speculative undertakings for the recovery of deposits, on the ground that they had been induced to apply for shares on the faith of the false statements set forth in the prospectus. Here the misrepresentation is not made to the party directly; but if it is made by one member of the managing committee, or of the directors in name of the rest, or by an agent authorised by them for the purpose, or by the body generally, the liability of any one of them for the whole of the injuries thence arising seems clearly established. “As at present advised” (says Coleridge, J., in *Watson*, 12 Q. B. 856), “I am of opinion, that if an advertisement is put out to induce parties to enter into a certain contract, and an individual does enter into such a contract, and then comes into Court to complain of misrepresentation, it is no part of his case to show that he was cognisant of the advertisement. *Prima facie*, it will be taken that he was influenced by it.” It is very possible, from the loose way in which joint-stock companies have been conducted, that many of the directors now charged with the consequences, knew not whether the facts stated in their annual reports were true or false. But this circumstance, as we have seen, will not save them from the consequences of appending their names to that which they did *not* know to be true, more particularly as is pointed out in *Jarret*, 6 C. B. 322, they were in a situation to know the falsehood of that which was published, and neglected to avail themselves of the means of knowledge within their power. See

Gerhard v. Bates, 2 E. and B. 476 ; Wontner v. Sharp, 4 C. B. 404. It is superfluous to add, that the misrepresentation we have throughout had in view includes the suppression of the truth as much as positive falsehood,—*e. g.*, as in Gerhard's case, the concealment of an engineer's report, showing that the undertaking was impracticable.

These principles it is not difficult to apply to the case of a director who concurs in the preparation of reports calculated to give a fictitious value to the shares ; and so they have been expressly made the ground of judgment in several recent cases. In the *National Exchange Company of Glasgow v. Drew and Dick*, 2 Macq. 103, the House of Lords very clearly explained the precise legal import of the publication and circulation by the directors, of false reports calculated to delude the public into buying shares in the company. The action was brought to recover the price of certain shares in the company, for which they had advanced the purchase-money. The defence was in effect that, shortly previous to the advance, the company, by their directors, fraudulently represented to the defendant, that the affairs of the company were in a flourishing state, whereas they were really insolvent, or nearly so—the fraudulent statements being contained in a concocted report presented to the shareholders. To this it was answered for the pursuers, that, assuming the allegation to be true, it did not form a fraud on the part of the company—the fraud, if there was any, was a fraud by the directors—the reports being made not *by* the company, but *to* the company. But the House of Lords determined, that the general body of shareholders could not, in corporate matters, be distracted from their own official organs. “When the company,” said the Lord Chancellor, “receives a report from their directors, it is not, from the nature of things, and from the exigencies of society, taken as between the company and third persons to be a representation by the company. The company, as an abstract being, can do nothing and do nothing. It can only act by its managers. When, therefore, the directors, in the discharge of their duty, fraudulently, for the purpose of misleading others as to the state of the concerns of the company, represent the company to be in a different state from what it in which they knew it to be, and the persons to whom the representation is addressed, act upon it in the belief that it is true, I cannot think that society can go on without treating that as a misrepresentation by the company, otherwise, companies of this sort could be in this extraordinary predicament, that they might employ, or must employ, agents to carry on their concerns ; and that those agents might make representations, be they ever so false and ever so fraudulent, and yet, nevertheless, that the company might, and must, benefit by those representations, without being at all liable to be told, that is gross fraud.”

The same reasoning has been recently applied to a similar state of facts in the well known *Aberdeen Bank* case. It therefore may now be considered conclusively settled, that the declaration of divi-

dends never earned, and the publication, or what is the same thing, the circulation among the shareholders of reports calculated to give a fictitious value to the stock, are facts sufficient to bring the directors under the general law as to the responsibilities arising from fraudulent misrepresentation; and this whether the reports related to matters which were or were not within their own cognisance, provided they were such as it was their duty to have ascertained.

THE TITLES TO LAND ACT.

(Concluded.)

SECTIONS XV. and XVI.—These sections deal with the descriptions of lands contained in conveyances. The description is the part of the deed which contributes most to its length; but it is also a portion which is regarded with superstitious reverence by the old school of conveyancers, and it required some fortitude on the part of the framers of the bill to deal with this subject. Without some such provision as that inserted, however, the work of abbreviating titles would have been left incomplete, and we do not know that a better mode could have been suggested than that embodied in these two clauses. It still further utilises the public registers, as the principle upon which the sections proceed is, that when once the description of land has entered the register, it is unnecessary to be constantly reproducing it in the progress of titles. The description is to be treated as those lengthened formal clauses were, which, by previous conveyancing statutes, were decently interred in the depths of an Act of Parliament, while a short expression was made to do duty in all future time in their stead. The provision is, that where lands have been particularly described in any prior conveyance, or other writ duly recorded in the appropriate Register of Sasines, it shall not be necessary, in any subsequent conveyance or writ, to repeat the particular description of the lands at length; but it shall be sufficient to specify the leading name, or other short distinctive description of the lands, naming the county and parish, or supposed parish, in which the lands lie, and to refer to the particular description contained in the prior conveyance or writ so recorded. This plan has been for several years in operation with regard to burdens and reservations; and the experience of every conveyancer must be that the change has worked beneficially. We have no doubt that the same result will follow the innovation enacted by these sections. Some practitioners doubt the propriety of separating the description from the deed in any case; but the description, instead of being separated, is perhaps more effectually united to the deed, in the manner proposed, than if it were to be inserted. Every one who has dealt much with titles, must have been struck with the inaccurate manner in which long descriptions are frequently transferred from one deed to another,—inaccuracies which may not be of sufficient importance to warrant an objection to the title, and yet suf-

iciently annoying where perfect accuracy is so desirable. Where the description is referred to on record, there is not the same opportunity for these changes creeping into the conveyance, and yet, when an altered description is absolutely required, it can of course be easily accomplished. The reference to the particular description contained in the prior conveyance must be made in the form of a schedule appended to the Act, and the reference is held equivalent to the full insertion of the description, and shall have the same effect as if the particular description had been inserted exactly as set forth in the prior conveyance. This course having been once followed establishes the leading name, or short distinctive description, in the progress; and thereafter it is competent and sufficient to use the leading name or short description, with the addition of the county and parish, and to make reference to the conveyance or writ in which the leading name or short distinctive description was specified, without again referring to the several conveyances or writs containing the particular description. When this latter course is followed, the use of the leading name or short description, with the addition of the county and parish, and reference to the conveyance introducing the leading name, is held to be equivalent to the full insertion of the particular description contained in the several conveyances, or other writs, recorded and specified.

Another very valuable improvement is carried out by the succeeding section (sec. 16). It is to the effect, that, where several lands are conveyed by the same deed, they may be comprehended under one general name, or, indeed, may be grouped under various general names, if each group be clearly defined, and its general name properly applied. Take, for example, the case of an heir taking up his title by Crown charter to a great variety of little properties, which had been gradually acquired by the ancestor. The description of the lands may occupy page after page, and form a most cumbrous and expensive part of the title. If the properties are sold with the title in this condition, the cost to both seller and buyer would be greatly increased by the length of the description; but if, in the charter, advantage were taken of the provisions of sec. 16, the description could be reduced to a few lines. The section provides that, where several lands are comprehended in one conveyance in favour of the same person or persons, it shall be competent to insert a clause in the conveyance, declaring that the whole lands conveyed, and therein particularly described, shall be designed and known in future by one general name, to be therein specified; and, on the conveyance containing such clause being duly recorded in the appropriate Register of Sasines, it shall be competent, in all subsequent conveyances or other writs, to use the general name specified in such clause as the name of the several lands declared by such clause to be comprehended under it. It is provided that a conveyance of the lands under the general name shall be as effectual in all respects as if the conveyance had contained a particular

description. There is also the provision, which requires to be kept constantly in view, that reference be made, in the conveyances, and Instruments of Sasine, and Notarial Instruments, to a prior recorded conveyance, or Instrument of Sasine, or Notarial Instrument, or other writ, in which the clause and description are contained.

Sections XVII. and XVIII.—These sections refer to deeds of entail, and the only objection we have to them is, that, as they shorten the deeds, there is less chance of blunders being committed, and consequently, more chance of the entails being made effectual, which we can scarcely regard in the light of a benefit. However, in an Act to “simplify the forms, and diminish the expense of completing titles to land,” the deed of entail could only be looked at as belonging to the same category as other conveyances. The one section provides, that it shall not be necessary to repeat the destination contained in the entail upon referring to it in the register of tailzies, or in any writ recorded in the appropriate register of sasines, forming part of the progress of title-deeds of the lands in the entail, in much the same manner as has already been described in the case of descriptions of lands. The other section provides, that, where a deed of entail contains an express clause authorising registration of the deed in the register of tailzies, it shall not be necessary to insert clauses of prohibition against alienation, contracting debt, and altering the order of succession; but such clause of registration shall have, in every respect, the same operation and effect as if such clauses of prohibition had been inserted according to the law and practice before the passing of the Act, and duly fenced with irritant and resolutive clauses.

Section XIX.—The object of this section is to specify the time during which the writs mentioned in the preceding clauses may be recorded, and what is to constitute the date of recording. It provides that all conveyances and procuratories of resignation *ad remanentiam*, with warrants of registration written thereon, and all notarial instruments and instruments of resignation *ad remanentiam* thereby authorized to be recorded in the register of sasines, may be recorded at any time in the life of the party on whose behalf the same shall be presented for registration, in the same manner as instruments of sasine are recorded. Had these latter words not been added, there would have been no doubt as to what was meant by the first part of the provision. But “the manner in which instruments of sasine are recorded” is in the lifetime of the party in whose favour they are taken. Conveyances, however, may be given in to be recorded on behalf of a party who presents them, but who is not the grantee, while the grantee may be dead (sects. 13 and 14). Could such a deed be held to be recorded in the same manner as instruments of sasine? The section goes on to provide that the date of entry in the minute-book shall be held to be the date of registration; and the date of registration of all such conveyances, procuratories of resignation *ad remanentiam*, notarial instruments, and instruments of resignation

ad remanentiam, shall be equivalent to the date of registration of instruments of sasine and instruments of resignation *ad remanentiam*, according to the existing law and practice. It is worthy of notice that this provision for the date of registration is a return to the practice which existed before the Act 8 and 9 Vict., cap. 35, that statute having made the certificate of the keeper of the presenting and entry to be the date of the instrument.

Section XX.—This is the permissive clause which enacts that nothing contained in the Act shall prevent the constitution, transmission, or completion of land rights by the forms in use prior to the passing of the Act; and it completes the sections which have a direct reference to the ordinary titles. The remainder of the Act deals with various other matters, some of them having but a faint claim to be admitted into this statute.

Before leaving this portion, however, we desire to revert to *section V.* Practitioners have felt a difficulty as to the effect of this section, which enacts, that it shall not be necessary to insert in any conveyance a clause of obligation to infeft, and which also enacts, that “if the lands shall be disposed to be holden *a me* only or *a me vel de me*, the clause so expressing the manner of holding shall imply that the lands are to be holden in the manner expressed in the Act 10 and 11 Vict., c. 48, sec. 2, with reference to obligations to infeft *a me* or *a me vel de me* respectively; and where no holding is expressed, the conveyance shall be held to imply that the lands are to be holden in the same manner in which the grantor of the conveyance held or might have held the same. There can be no doubt as to what the framers of the Act meant by this clause. It was not intended that the nature of the grantee’s holding should be limited by the actual condition of the grantor’s title, but that the holding in the new conveyance should be considered to be the same as that in the preceding one, or, as it has been expressed, that the grantee should not hold the lands in the same but *by a similar* manner of holding as that by which the grantee held or might have held them. In the recently published Supplement to Menzies’ Lectures on Conveyancing,¹ a careful and methodically arranged Abstract of the Titles to Land Act, the point is thus ingeniously discussed (p. 21) “The Act does not alter the rights of superiors, nor affect the relative position and interest of them and their vassals; and it is provided that conveyances recorded in conformity with its provisions, may be confirmed, and that the confirmation so obtained shall confirm the whole prior deeds and instruments necessary to be confirmed in order to complete the investiture of the party obtaining the confirmation.—Sects. 6, 7. Thus, it would appear that where a recorded conveyance expresses only an *a me* holding, confirmation is now as necessary as it formerly

¹ Supplement to the Lectures on Conveyancing of the late Allan Menzies, A.M., W.S., Professor of Conveyancing in the University of Edinburgh. Being an Abstract of the Titles to Land (Scotland) Act, 1858. Edinburgh: Thomas Constable and Co.

was, of a seisine on a conveyance, with a similar obligation to infeft; and, when the omission of a clause of obligation to infeft, under the provision to that effect contained in this section (sec. 5), places a recorded conveyance in the position of a conveyance having an *a me* holding, with a seisine thereon unconfirmed, there seems to be no ground for distinction between the two cases. In both instances, confirmation is necessary to render the title unexceptionable. For example, A, holds lands *de me* of C, disposes them, without any clause of obligation to infeft, to B. A, by such a conveyance, disposes these lands to be holden by B in the same manner as A "held or might have held" them. But A, being the immediate vassal, *might have held* the lands in no other way than he did, i. e., *de me* of C; and in this case, therefore, the conveyance under consideration, must necessarily be restricted to the effect of implying that B shall hold the lands as A *held* them, that is *de me* of C. But A, the vassal, cannot authorise B to hold the lands *de me* of C his superior. It would therefore appear, that in circumstances similar to those here assumed, the conveyance virtually becomes a disposition with an obligation to infeft *a me*, which, on being recorded, requires confirmation to complete a valid title; for it is only after confirmation by C that B holds the lands as A *held* them, i. e., as C's immediate vassal. Again, suppose A, holding lands of D, to dispoise them to B, by a conveyance containing an obligation to infeft, to be holden *a me vel de me*, and B, after being infeft, to sell without any obligation to infeft to C, in this case, under the terms of this section, C is understood to hold the lands as B held them, that is, either (1) *de me* of A, or *a me* of D. Of course, confirmation by D is required to complete a valid title under the holding *a me* of him; but as B cannot authorise C to hold *de me* of his (B's) mid-superior A, confirmation by A is equally necessary, as in the last example, to enable C to complete a valid title under that holding. for, as noticed in the last example, it is only by this means that C is enabled to hold the lands as B, the granter of the conveyance, *held* them; or (2) C is understood, in terms of this section, to hold the lands as B might have held them, that is (after confirmation of his base infeftment on the indefinite precept in A's disposition has been obtained) *de me* of D; and confirmation is, of course, equally required to enable C to hold them in that manner." It is impossible not to be somewhat impressed with these views, although it is apparent that the difficulty under the section in question arises depends very much upon whether the words used are taken in their strictly technical conveyancing sense, or in a more popular signification. We believe that if the question were to come before the Court, the judges, having regard to the professed intention of the legislature in passing the Act, and being in no ways bound to read the terms in their strict or technical sense, would be very much inclined to give effect to the more comprehensive rendering of the clause. It is probable, however, that an amendment Act may be

passed during next session ; and we would respectfully suggest that the opportunity should be taken to remove all doubt, by declaring the signification which the clause was intended to bear. It will be remembered, that the present Act does not extend to burgage subjects. These may be also dealt with next session ; and although it is a system not much to be commended, might it not be advisable, for the purpose of preventing the confusion which a multitude of statutes about the same matter is apt to create, to insert the clauses amending the present Act in the Titles to Land (Burghs Scotland) Act 1859 ? In the meantime, as the matter is doubtful, it may be safer for conveyancers to insert the holding. There is no necessity, however, to copy the obligation to infeft, as it formerly stood, although we believe some conveyancers are doing so. The words, "and I oblige myself to infeft," are certainly no longer requisite ; and to insert them in conveyances, according to the new form, is incorrect.

Section XXI.—In this section, a new mode of completing a title to lands by a judicial factor, is enacted. A great necessity existed for some such enactment as this ; the mode of making up titles in the persons of judicial factors being frequently vexatiously cumbrous and expensive. The plan now in operation is very simple. Where a judicial factor, or other judicial manager, shall apply, by petition, for authority to complete a title to any lands forming part of the estate under his management, and where the petition shall specify the lands to which such title is to be completed, *the warrant granted for completing such title shall also specify the lands to which such title is to be completed ; and such warrant shall have the legal operation and effect of a disposition of the lands in favour of such judicial factor or manager from the party whose estate is under judicial management, to be holden in the same manner as such party held or might have held the same.* We have heard some criticism upon the term, "the warrant," used in this section, on the ground of vagueness ; but they do not appear to be well founded, as the expressions in the section, although not entering needlessly into details, cannot possibly refer to anything else than an application to the Court of Session, and the interlocutor pronounced thereon. With regard to the manner of holding, the same remarks will, to a great extent, apply, as have just been made upon sec. 5. In the case of heritable securities, the judicial factor, on recording his warrant in the appropriate Register of Sasines, shall be in the same position as if the party had granted an assignation, and the assignation been recorded at the date of recording said warrant.

Section XXII.—The trustee on a sequestrated estate, and the liquidators of a joint-stock company, were placed at an equal disadvantage with a judicial factor, in making up a title to the bankrupt's or company's heritable property ; and this section places these parties now upon equally favourable terms with the judicial factor—the only difference being, that, instead of the warrant operating

as a conveyance, these parties must expedite a notarial instrument, setting forth the Act and warrant of confirmation of the one, and the appointment of the other respectively, and specifying the lands to which a title is to be completed. On the notarial instrument being recorded, the trustee and the liquidators shall be held to be in all respects in the same position as if the bankrupt or company had granted a conveyance to them of the lands contained in the notarial instrument. There is a corresponding change, of course, in the matter of heritable securities. The remarks about the holding already referred to, require also to be borne in mind with reference to this section.

Sections XXIII. XXIV.—In these sections, there is a mode provided for relinquishing superiorities, and obtaining an investiture by the over-superior, and also provisions as to the application of the price of entailed superiorities, and the mode of charging the price of superiorities of entailed lands on the entailed estate. In order to extinguish mid-superiorities not defeasible by the vassal, the subject-superior, whether himself entered with his superior or not, may grant a Deed of Relinquishment in the form set forth in a schedule. An acceptance is written on the Deed by the vassal on these two writs being followed by a writ of investiture by the over-superior also written on the Deed of Relinquishment, and all recorded in the appropriate Register of Sasines, the superiority shall be held to be extinguished. By Sect. 24, the over-superior is bound to receive, as his immediate vassal, the vassal in whose favour the Deed of Relinquishment is granted, and who has accepted thereof. It is unnecessary to refer at length to the various other provisions in these sections.

Section XXVII.—We have here both a desirable improvement in practice, and a wise alteration of the law. The first is, that it is not now necessary to raise a separate Summons of Constitution and a separate Summons of Adjudication in actions of Constitution and Adjudication against an apparent heir on account of his ancestor's debt or obligation, for the purpose of attaching the ancestor's heritable estate. The alteration of the law is, to use an Irishism, that the *annus deliberandi* is reduced to six months. The Decree of Adjudication, in the cases mentioned in this section, is to be equivalent to and to have the legal operation and effect of a conveyance from the ancestor in favour of the adjudger, "to be holden in the same manner as the ancestor held, or might have held, the same." This expression falls under the remarks which have been already made upon the fifth Section. The rights of the superior to the composition, payable by an adjudger as due under the existing law, are reserved, and provision made for their enforcement.

Sections XXVIII. to XXXVII.—These, with the exception of sec. 36, which is the interpretation clause, and has been already commented on, are a series of short sections referring to a variety of matters having little connection with each other, but not requiring

special notice. We may only notice the rather curious fact, that in c. 31, which provides for the case of errors or defects in certain instruments, an error has been committed in referring to 8 and 9 iet. cap. 35, instead of cap. 31. By sec. 32, the enormous block, 'wax in a tin case, which used to be attached to Crown charters, is now to be attached, "if asked only." And, by sec. 34, deeds and instruments may be partly written and partly printed or engraved—provision which shows a spirit of liberality in the ideas now entertained of conveyancing practice, but which will not be available to any great extent.

Review.

Conveyancing Fees.—To meet the changes introduced by the Titles to Land Act, the Society of Writers to the Signet has adopted certain alterations in the table of fees for conveyancing. This was rendered necessary by the fact, that not only are forms abbreviated, but many deeds have been swept away, and in their room new writs created, for which, by the existing table, it would be impossible to charge anything. The new scale, however, is only a temporary one; the whole question of professional remuneration for conveyancing and general business, requires reconsideration; and the subject has, very properly, been remitted to a committee, with power to communicate with other legal bodies in Scotland. Meantime, till this revision has been effected, the Society has confined itself to the changes introduced in the transference of any heritable subject, the recording of the disposition or a notarial writ, in room of the abolished sasine, as equivalent to infestment; and (2) the new forms in the renewal of the investiture in lands held of the Crown-Prince or a subject-superior. The recommendations of the Committee were in substance as follows:—

The charges on all conveyances of land, or other heritable subjects, on sales, where the new forms are adopted, are proposed to be as under—those to embrace all trouble in examination of previous title-deeds and searches:—

Charge. To the purchaser's agent, for drawing the deed, including the final adjustment of it.

The price not exceeding L.300—

For each L.100, or part of L.100, a fee of . . . L.1 0 0

The price exceeding L.300, but not exceeding L.5000—

The above rate for the first L.300, and for every additional L.100, or part of L.100, . . . 0 10 0

The price exceeding L.5000, but not exceeding L.20,000—

The above rates for the first L.5000, and for every additional L.100, or part of L.100, . . . 0 5 0

The price exceeding L.20,000—

The above rates for the first L.20,000, and for every additional L.1000, or part of L.1000, . . . 2 0 0

The purchaser's agent also to receive the fees of drawing the relative inventory of a legal process of title-deeds, according to the length.

To the seller's agent, for revision and adjustment of the conveyance and inventory—One-half of the above fees.

The rule as to preparation and revisal of the conveyance to remain as at present; but it shall be held as the rule, where not stipulated to the contrary, that the whole fees of the conveyance, including stamp-duty and revising-fee, together with the present fees of drawing and revising of the relative inventory of titles, shall be paid equally by seller and purchaser.

For preparation of the warrant for registration of every conveyance, in order to attach to it the same legal force and effect in all respects as if it had been followed by an instrument of sasine duly expedite and recorded according to the present law and practice, the following fees :—

Where the value does not exceed L.300,	L.0 10 6
Above L.300, and not exceeding L.1000,	1 1 0
Above L.1000, and not exceeding L.2000,	2 2 0
Above L.2000, and not exceeding L.5000,	3 3 0
Above L.5000, and not exceeding L.10,000,	4 4 0
Exceeding L.10,000,	5 5 0
Besides 6s. 8d. for giving in, and taking out, the deed.	

In the case of all notarial instruments expedite on conveyances for the purpose of registration, your committee would propose that the notarial fee shall be the same as would have been charged for recording the deed, had it been limited to the conveyance of lands or heritable subjects embraced in the instrument according to the scale before given, and that there shall also be charged regulation fees, according to length, for drawing the instrument, and 6s. 8d. for giving in and taking out the same from the record.

The Act, as already mentioned, allows certain writs to be substituted for charters by progress and precepts of *clare constat*, and abolishes sasines on such of those deeds as have hitherto contained warrants for infeftment. Although however, entries both with the Crown and Prince and subject superiors will by adoption of the forms sanctioned by the Act, be much shortened, yet, both as regards subject-superiors and vassals, the same onerous duties will still devolve on the agents. For the agent of the superior will have the duty of examination of the last title granted, and of any subsequent links in the progress of titles and ascertainment of the proper duties exigible on the entry of the vassal, and to be exigible thereafter, and he will have to prepare the writ which has to state the result of such examination, and thereafter to get the writ executed by the superior in like manner as the charter now. Again, the agent of the vassal must, in the case of Crown writs, apply for the writ, and present a draft thereof; and in the case of entries from subject-superiors, he will have to see that the writ is adapted to the circumstances of the case, and executed in proper form, and that the proper duties are exacted from his client. These duties, where the writ is greatly reduced in length, and sasines abolished, require a new scale of remuneration. In the opinion of your committee, in addition to regulation-fees of drawing, the following would be a proper scale of charges in every case where an entry to lands, feu-duties, or houses, is given :—

Where the value does not exceed L.300,	L.0 10 0
Exceeding L.300, and not exceeding L.1000,	1 0 0
Exceeding L.1000, for each additional L.1000, or part thereof, up to L.5000,	1 0 0
Exceeding L.5000, for each additional L.1000, or part thereof, up to L.20,000,	0 5 0
Exceeding L.20,000, for each additional L.1000, or part thereof,	0 2 6

These fees to be charged by the agent of the vassal in Crown entries, and by

the agent of the superior in entries by subjects, a fee equal to one-half thereof being chargeable in the latter case by the vassal's agent.

They are of opinion that these values should be fixed, in the case of lands, by valuing these at 25 years' purchase of the free rent; in the case of feu-duties and ground-annuals, by valuing these at 20 years' purchase; and in the case of houses, by valuing these at 15 years' purchase of the free rent.

Farther, they are of opinion that the agent of the superior should be entitled to engross in the cartulary, along with the writ of resignation or confirmation, the conveyance or instrument on which the writ is written, or such part as relates to the lands or subjects entered to, and to charge 2s. 6d per sheet for this engrossment.

In all the cases specified above, where charges *ad valorem* are allowed for the drawing of deeds, it shall be understood to be optional to the agent to charge either the fees *ad valorem*, or the regulation fees of drawing, according to the length.

It will be seen that the basis of the above proposals is an extension of the principle of charging according to the value of the subject conveyed, instead of by the length of the deed making the conveyance. The length of the deed is no measure of the labour involved in its preparation, or of the responsibility incurred by the conveyancer; and now that so many clauses are abolished, and an Act has been passed for the express purpose of making deeds as short as possible, it was obviously indispensable to take away every temptation to prolixity.

Charging *ad valorem* seems a sound principle; and, by its adoption, we venture to think that the profession will be gainers, at least so far regards the first class of deeds, viz., deeds creating new, or transferring old, grants of land. Thus, take the case of a sale of property at L.1000. By the old scale, the cost to the purchaser would have been L.5, 5s., while, under the new scale, the cost will be L.6, 6s., and the difficulty, labour, and expense will be infinitely less. Perhaps, the most marked feature in the Act is the abolition of the antiquated and useless instrument of sasine, which, no doubt, will most seriously affect the emolument of conveyancers, but it would appear from the charges for preparation of the warrant for registration in lieu of it, that they have found a substitute almost as valuable. The warrant is of the simplest possible kind; its preparation might be trusted to the youngest apprentice; and yet a charge for so doing, where the value does not exceed L.300, is made 10s. 6d.; not exceeding L.1000, L.1, 1s.; not exceeding L.2000, L.2, 2s.; not exceeding L.5000, L.3, 3s.; not exceeding L.10,000, L.4, 4s.; exceeding L.10,000, L.5, 5s.; besides 6s. 8d. for giving in and taking out of record. For a little trouble, it is right that a small fee should be charged, but we will not be surprised to hear that clients stickle and grumble more at this item than at any other. For notarial instruments expedite on conveyances for registration, the notarial fee to be charged appears unexceptionable. With regard to the second class of deeds,—for renewals of investiture,—the charge, in addition to regulation fees of drawing, is regulated entirely by value; and,

that according to the nature of the subject, to be computed in the case of lands at twenty-five years' purchase of the free rent; in case of feu-duties and ground-annuals, at twenty years' purchase; and in the case of house property, at fifteen years' purchase of the free rent. It might have been better had the scale been fixed according to value, without regulation fees, as, from the great reduction in the length of this class of deeds, regulation fees must be comparatively trifling, and with all the more propriety might a uniform rate of charge be preserved.

The Christmas Jury Sitings.—The approach of Christmas reminds us of the continuance of one of the most cruel wrongs ever done to the profession. Of all the provisions of the last Court of Session Act, the most thoroughly deplorable was the abbreviation of the Christmas vacation. It was a pleasant and a *necessary* break in the long session, from the beginning of November to nearly the end of March. It enabled one to have a week's curling, and to enjoy the festive season without the distractions of business. But the Court of Session was in a frightful arrear of business. The cry had arisen for extended sittings. A parliamentary investigation was imminent, and something required to be done. The honourable member for Greenock had given notice of a motion that the sittings should commence for the Winter Session on the 15th of October, which did not seem at all to meet the wishes or the feelings of persons of influence. The motion dropt from the roll of the House of Commons; but the reason has never been explained. The Bill of 1857 was one promoted by the Government, and, perhaps, he is not responsible for it; but the result has given more dissatisfaction than any other measure we recollect of in recent years—a dissatisfaction which has been especially expressed at the abridgment of the Christmas recess, from three weeks to a fortnight. This appears to have been resorted to, in order to satisfy the popular clamour for extended sittings, and to avoid the necessity of beginning at a reasonable time in October.

During that Christmas recess, there must by law be jury sittings and there must also be held the Circuit Court at Glasgow, which generally occupies a week. The time which, in all civilised countries, is sacred from business, must thus be encroached upon; and as may be expected, both jurors and witnesses cannot be possessed of that equanimity of temper which is necessary to justice. These arrangements were made without any consultation with the great legal bodies in Scotland; and the Court of Session is scarcely to be censured, although it has done something which is plainly inconsistent with the statute law of the land, in order to remove the grievance.

By the Act 1 Wm. IV. cap. 69, sec. 9, it is enacted, "That all causes remaining untried, and entered as ready for trial at the termination of the winter or summer sessions, or at the commencement

the Christmas recess, *shall be tried* at the sittings of the Court, to be held immediately after these periods respectively."

Under this statute parties have a right to have their causes tried during the Christmas Recess; and, therefore, we dispute the legality of the notice that has been issued by both Divisions, that "No cases can be tried at these sittings, except such as shall, by order of Court, on the application of either party, have been specially set on for trial."

This is practically repealing an Act of Parliament; and, in the present day, we are safe in denying the right of the Court so to do. If a party chooses to give notice of trial for the Christmas sittings, he may respectfully deny the right of the Court to refuse to allow him to go to trial. It is quite plain, that this order of the Court, if persisted in, may give rise to very disagreeable discussions; and that a better course is at once to make a representation in the proper manner, to restore the Christmas Recess to three weeks, as it has been from time immemorial, and to commence the sittings of the Court at same period in October.

In connection with this subject, we may give expression to the dissatisfaction which has been generally occasioned by the Lord President having availed himself of the powers contained in 20 and 21 Geo. 3, c. 56, to equalize the labours of the Judges of the Outer Bench. He has transferred twenty causes from the long Debate of the popular Lord Ardmillan, to the not less able Lord Holmes. This is the first attempt to check that caprice, on the part of the agents, to which we had recently occasion to refer.

The Small Debt Court.—The Lord Advocate has been receiving great reputation from the Edinburgh Chamber of Commerce, relative to the enlargement of the jurisdiction of the Small Debt Court. We think that the same form of procedure might be advantageously employed in all cases where the sum in dispute does not exceed £100. This is a very natural desire on their part. In large towns the Small Debt Court is chiefly frequented by tradesmen, for the constitution of the Court is chiefly for the recovery of small debts. The action is often unopposed; and, if the process is sufficient for the ends of substantial justice in questions involving £12, there is no good reason why the limit should not be considerably extended. It is perfectly true that the money value of the measure of the importance of a suit. A question as to a few shillings may involve principles of the gravest kind and most difficult application. But the experience of the new forms of the Act of 1853, has demonstrated that, in the great majority of questions brought before the Sheriff, a bare notice of the ground of action and of the line of defence, is sufficient for all practical purposes. The Sheriff is chiefly called on to deal with such matters as questions for the implement of contract, damages for the breach, compensation for injuries, and questions of that class. In these cases, the record may be of the slenderest form; the real struggle

takes place on the question of fact, as it is presented in the proof. This form of proceeding has given the amplest satisfaction in all parts of the country, in cases of very considerable value; and, if a pursuer is prepared to dispense with notice of the line of defence, or if it were provided that, where the defender, after citation, means to raise a collateral question—such as set off—notice should be given before the hearing, there could be no reason whatever, why, in all cases under a much larger amount than at present, the Sheriff Court should be made a Small Debt Court. The only difference would be, that instead of the proof being fixed at some distant day, the inquiry would be gone into on the spot, and a decision would be attained with one attendance, instead of several. But we do not think it would be prudent to go the length of L.50 at one leap. Extend the jurisdiction only to L.25—the margin now competent in the Court of Session. We believe, therefore, that the Lord Advocate expressed what is the general opinion of the profession, when he indicated an inclination in favour of a change to that extent. At the same time, if a change is to be made, it must not be unconditional. At the present moment, the way in which business is conducted in the Small Debt Court, is very discreditable. There is no possibility of review, and the Judge knows it. A Sheriff sitting in his Small Debt Court is the only absolutely irresponsible man in this country. Should it excite surprise that a frequent miscarriage of justice is the consequence? The party has no professional assistance—he cannot explain what he would be at; or, he has come away without evidence to support his case; or, if his witnesses are in attendance, the Court is in too great a hurry to hear them. Thus, no doubt, a speedy judgment is obtained, but a judgment at a frightful sacrifice,—the sacrifice of the care, the patience, the deliberation, the thorough investigation—in short, the sacrifice of all the qualities for which a Court of justice is respected, and from which its decisions receive their value. Any new measure, therefore, for the extension of the sphere of the Small Debt Court must have two leading features; parties must be entitled to appear by counsel or agent; and, in all cases above a certain sum, an appeal should lie to the Supreme Court on questions of law, or the admission or rejection of evidence. This right of appeal would be rarely taken advantage of—possibly in not one case in a hundred, but the very fact that such an appeal might be brought, would secure for the other ninety-nine, the deliberate consideration which, unhappily, is at present so painfully wanting. In the short-sighted legislation of recent years, this salutary principle has been completely ignored, with a view, it is said, to save time, and prevent the accumulation of forms, and the creation of an enormous process. But there is no reason why the right of review should involve any such difficulty. In the first place, the appeal should be taken to the Court of Session, or the Circuit Court, *direct*; secondly, it should be presented in the form of a case

prepared by the parties of consent, and—if they differ by the Judge, whose decision is impugned—briefly setting forth the facts, and stating the questions submitted for the opinion of the Court above. This is the form in use in England, in appeals from the County Courts. Since last year it has been employed for bringing the decisions of Justices under the cognisance of the Supreme Courts, and its operation in practice has given unmixed satisfaction. It is both inexpensive and expeditious; and the occasional reversal of a judgment has a most salutary influence on the Court below. In fact, a right of review is an act of justice to the Judge himself. He could then know that if he went wrong, the error is not beyond remedy. As the Lord Advocate very justly observes, “To a Judge deciding a great number of cases under L.50, some of them of much difficulty, it would be a great relief to him, and a source of satisfaction to the litigants, to know that there was at least *one* Judge of Appeal, by whom an erroneous judgment would be corrected.” We hope that, on the meeting of Parliament, the Lord Advocate will avail himself of his present tenure of power, to hand down his name to posterity, in connection with a measure which would undoubtedly be one of the most popular with the profession and the public that could be devised.

Stamps.—We have been requested to call attention to a matter of some importance to the profession, the operation, namely, of the Stamp Laws affecting Writs of Confirmation and Resignation, under the Lands Titles Act.

The Inland Revenue, we are informed, regard those writs as subject to the 5s. duty imposed on charters. Hence, any deed upon which a writ is engrossed, has to be presented at the Stamp Office in Edinburgh, to be forwarded to Somerset House, for the purpose of being stamped with the 5s. die. This necessarily occasions considerable trouble and delay, and must be treated by the agents here and in the provinces, as a grievance of which it would be well to get rid. With regard to *existing* deeds, possibly there is no remedy for the evil; but, as to *future* deeds, upon which it is intended to engross a writ, one would fancy that it could very easily be averted, by extending these deeds upon a stamp embracing the 5s. duty; seeing, that if the full duty be paid, the prime object of the Stamp Laws is attained.

This course, however, is questionable; as a stamp, we are informed, can refer solely to *one* deed, and, should the deed be engrossed on a higher stamp than the statute requires, it is regarded as written upon a wrong stamp, although valid by sufferance. Hence, the stamp embracing the 5s. duty would be held to refer only to the deed upon which the writ was to be engrossed, and a separate stamp of 5s. would require afterwards to be imposed as applicable to the writ.

Now, on referring to the statute 55 Geo. III., c. 184, which,

although considerably altered in its details, is still considered to be the leading Stamp Act, we find, that by section 10 it is enacted, "That from and after the passing of this Act, all instruments for or upon which any stamp or stamps *shall have been used* of an improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon, shall nevertheless be deemed valid and effectual in the law."

If the difficulty arise under the above enactment, which all will admit to be a *very considerate one*, it appears to us that the words "shall have been used," most pointedly refer to instruments which shall have been engrossed prior to the passing of the Act, on higher stamps than are required by that Act.

But even although the objection be good, it is none the less desirable that the evil should be remedied; and it has been suggested that the profession should bring the matter before the Commissioners of Inland Revenue, who will at once see the expediency of adopting some such course as that suggested, by which not only the profession, but their own officials, will be saved from much unnecessary trouble and inconvenience.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

JOHN KIRKLAND AND SON v. NISBET AND COMPANY.

Contract—Jury Trial—Evidence—Mercantile Usage.

This case went to trial on 22d March 1858, before the Lord President and a jury, on the question, Whether the defender had wrongfully refused, except to a partial extent, to take delivery of certain sugars, and to pay the price thereof; and whether they were owing the pursuers L.1253, 5s. 9d., or any part thereof, with interest, etc.? The pursuers were merchants in Madras and the defenders were merchants in Glasgow. There had been a course of dealing between the parties, the defenders commissioning the pursuers to send them certain quantities of sugar; and, on the present occasion, various letters and other documents were founded on as establishing a contract, which gave rise to the present action. At the trial a witness for the pursuers was cross-examined by the counsel for the defenders, who proposed to put a letter, addressed by the pursuers to the defenders, in reply to an order, and being the leading document in the case, into his hands, and after reading it, to ask the question, "What would the employer be entitled to expect?" The pursuers objected to this question. The objection was sustained, and the defenders excepted. The verdict was against them, and their exception was now discussed. They pleaded, that where the language of a contract was ambiguous—which they contended this was—it was competent to examine persons in the same trade in regard to it. The object of the question was to ascertain whether, in the opinion of the witness, the contract referred to in the letter was absolute

conditional. The object was not to bring mercantile usage to bear upon construction. Taylor on Evidence (Ed. 1846), p. 937; Smith v. Wilson, Barn. and Adolph, 728; Wilson, 9; Clark and Fin., 555. *Replied*—There is no technical expression in this letter which requires explanation, and therefore the witness is asked his opinion upon a question which it is the province of the judge and the jury to determine. Taylor on Evidence, pp. 54-5; Calder, 10th Sept., 5, W. and S., 410; Haldane, 28th May 1842; 4 Session Cases, 107. *Held*, that looking to the circumstances in which the question was put, and having reference to the time at which it was put, the question was properly allowed. Had the object been to establish the meaning of the document having reference to mercantile usage, the question might have been put, but that was not the object, and therefore it trenchanted upon the province of the jury, whose duty it was to construe the letter in connection with the various other documents submitted to them.

HUGH BIGGAR'S TRUSTEES v. MRS ISABELLA LAING AND OTHERS.—Nov. 17.

Clause—Construction—Vesting.

By trust settlement the late Hugh Biggar left to his wife the life-rent of his whole property, and after her death and that of the testator, he directed his trustees to convert his estate into cash, and pay over the whole residue to his son, John Biggar, whom failing, to the lawful children of his body. By a deed in pursuance of this settlement, the testator, in the event of his spouse surviving him, declared that she should succeed to the whole residue, and should have power to dispose of the same; but that whatever residue should remain unbequeathed at her death, should accrue to the lawful children of his son John Biggar, and the survivor of them; whom failing, to the said John Biggar himself; and the said John Biggar, to Dr Michael Russell and his heirs; and, in the event of his spouse predeceasing him, he left the whole residue to the said lawful children of his son John Biggar, and the survivor of them; whom failing, to John Biggar himself, and then to Dr Michael Russell and his heirs. The testator's wife predeceased him. At his own death, his son, John Biggar, was living, and three of his children. One of them, Mrs Isabella Biggar or Laing, now claimed a third of the residue of his estate. The other two children were believed to be now alive, as also John Biggar, but all of them were resident in America, and Mrs Laing alone claimed in the process. It was also believed that John Biggar had contracted a second marriage, but whether he had any children by that marriage did not for certain appear. In these circumstances, the testator's sole surviving trustee brought a multiplicity of points and exoneration, and pleaded that she was bound to retain the fund *in medio*, which consisted of the whole residue of the estate, until it should appear whether John Biggar should have any more children. The residue was given to his children as a class, whom failing, to John Biggar himself. This included children born and to be born. That was the natural construction of the phrase, and there was nothing in the other clauses of the deed to contradict it. Eccles, 17th July 1856, 18, Session Cases 1303; Hardman, 6th June 1828, 6, S. 920; Scheniman, 25th June 1858, 6 S. 1019; Shaw, 6, S., Appendix. At any rate the trustee could only be required to denude on fiduciary caution. *Replied*—The deed did not contemplate a trust of long endurance. It made no provision for the accumulation of interest or otherwise. The presumption, therefore, was, that the parties intended to be benefited were the children alive at the date of the testator's death. That fixed the period of payment and of distribution, and distinguished this case from the cases cited. Any other construction would defeat the destination to John Biggar, which contemplated the possibility of his taking the succession in some event, no matter what, but which if the vesting was to be postponed till his death, was an impossibility. Williams on Executors (Ed. 1856), p. 981; Pearson, 28th June 1825, F. C. *Held*—That the children intended to be benefited were the children alive at the testator's death. That was the fixed period of payment, and therefore the

claim of Mrs Laing to a third share of the residue sustained. *Held*—Also, that the claimant was not bound to find caution for repayment, in the event of future children emerging and claiming a share; but, *Observed*—That this decision would not be conclusive against such claim.

JOHN MATHER v. JOHN SMITH.—Nov. 23.

Process—Reponing—Decree by Defaults.

The pursuer of this action having become bankrupt, the dependence was intimated to his trustee, who refused to sist himself. The pursuer was then ordained to find caution, but failed, and decree by default was pronounced against him. He reclaimed, and prayed to be reponed. A remit was accordingly made to the Lord Ordinary for that purpose, but he again failed to obtemper the order, and decree was pronounced against him. On a second Reclaiming Note, a second remit was made, and an order pronounced by the Lord Ordinary, to lodge a bond of caution within ten days. A third time the pursuer failed to obtemper the order; and decree having been again pronounced against him, he for the third time reclaimed, and prayed to be reponed. The respondent objected to the competency of the Reclaiming Note—(1) In respect the interlocutor reclaimed against, having been pronounced *in foro*, the record ought to have been appended to the Reclaiming Note (A. S. 1828, sec. 72, Hopetoun, 24th May 1839, 1 Session Cases, 792; Fraser, 13th Nov. 1833; Burnside, 8th Dec. 1827, 6 S. 229); (2) In respect the interlocutor, having been pronounced on a remit from the Court, was reviewable only to the extent of ascertaining whether it had been pronounced in terms of the remit (Monro, 15th July 1845, 7 Session Cases, 1044). *Replied*—(1) There is no closed record, therefore there is no record to append (Wilson v. Stevenson, 13th June 1835, 13 Session Cases, 962); (2) The pursuer only wants to follow out the remit, and to be allowed to lodge the bond of caution, which he had had difficulty in getting signed, owing to the absence of the cautioner. *Held*—That the objections could not be sustained, and that such formal objections—at all times ungracious—must in this instance, being unsuccessful, be visited with expenses. Further, that there was no statutory objection to receiving the bond. The Lord Ordinary's order was not peremptory, and might have been prorogated; but no prorogation was asked for. The correspondence, however, produced, showed that the pursuer had been endeavouring to get the bond executed, and the explanation offered as to the cautioner's absence was not unimportant. Therefore, in the special circumstances of this case, the bond allowed to be received, but a sum of expenses awarded against the pursuer for his delay in lodging the bond, equal to that awarded against the defender for his persevering objections to its being received.

SECOND DIVISION.

MATTHEW v. PATULLO.—Nov. 13.

Summary Petition—Competency—Act 20 and 21 Vict., c. 56, sec. 4.

This was a petition for recal of arrestments and discharge of inhibition, presented by a judicial factor appointed by the Court, with the view, as it was alleged, of enabling him to proceed with the management of the estate. The arrestments had been used by the respondent on a decree pronounced by the Second Division of the Court, but were alleged to have all fallen and become inept. The petition was to the Lords of Council and Session, and was presented in the Second Division. It was objected, that the petition was not incident to any depending cause, and was, under the recent Act, incompetent. It was contended that it should have been brought before the Junior Lord Ordinary. *Held* (after consultation with the other Division) that the petition was competent. The grounds of judgment were not stated.

FERGUSON BLAIE v. ALLEN, Nov. 16.

Obligation—Revenue—Income Tax. Construction—Statutes 5 and 6 Victoria, c. 35; 16 and 17 Victoria, c. 34.

By an antenuptial marriage contract, a husband bound himself and his heirs and representatives, to pay to his widow after his death and during all the days of her life, an annuity of L.1200 sterling, "exempted from all deductions whatsoever," and an additional annuity equal to four per cent. on the sum she should receive from her father as her portion. The husband died, leaving only child, a son, in pupilarity. In an action against him and his factor *co tutoris*, the widow concluded for decrees (1) of declarator that she was entitled to payment of her annuity without deduction of the annuity tax paid thereon by the factor *loco tutoris*; (2) for payment of it without such deduction; and (3) for payment of sums deducted from former payments in respect of income tax. *Held* (affirming the judgment of Lord Mackenzie, Ordinary) summing that, on a sound construction of the contract, it should be held to have been agreed to pay the annuity to the pursuer without deduction of income tax, that such a contract was void, under the provisions of the 103d section of the Act 5 and 6 Vict., c. 35, as reviewed by the Act of 16 and 17 Vict., c. 34, sect. 5; and that, in accounting with the pursuer for her annuities, the defenders were entitled to deduct income tax.

Authorities cited.—*Bullock v. Beaton*, 8th Feb. 1853, xv. D., p. 373; *Wall* (1847), xv. Symond's Cases in Chancery, p. 513; *Horne v. Synge*, xv. D., p. 440; *Cheyne v. Cheyne's Trustees*, 14th Feb. 1857, decided by Lord Mackenzie, Ordinary, and acquiesced in—not reported.

PRATT v. ABERCROMBY.—Nov. 18.

Lease—Succession—Special Stipulation—Title to Sue.

A set of printed regulations, with reference to which the whole farms belonging to a large proprietor were let, excluded heirs portioners from succession to leases. After communings between the landlord and Pratt, an intending tenant, terms for a nineteen years lease of a farm were agreed on, of which a memorandum was made and signed by both, stating the rent to be paid, the arrangement as to houses and buildings, interest to be paid on money expended on drains, the rotation of crop, and only making reference to the regulations as, "All march ditches, etc., to be kept according to regulations." This memorandum was handed to the landlord's agent, in order that he might prepare a lease in terms of it. The entry to the farm was arranged to be at Whitsunday 1849. The agent prepared a missive offer for the farm, which the tenant signed, and the agent accepted for the landlord. Afterwards it was read between the landlord's overseer and Pratt, that Pratt's entry should be in the term of Martinmas 1848; the outgoing tenant having left at Whitsunday previous, when the landlord had taken the farm into his own hands. Pratt took over from the outgoing tenant the waygoing crop, and commenced labour and dung the lands; he died in February 1849, leaving three daughters. The farm was let by the landlord to another tenant. In an action of damages at the instance of Pratt's eldest daughter, against the landlord's heir, loss sustained by her, through being deprived of the succession to the lease: *Held*—(affirming the judgment of the Lord Ordinary, Lord Cowan dissenting), that the missive offer accepted by the agent for the landlord could not be looked at as constituting a lease, the agent not having power to act as factor. That the memorandum (which was stamped), and the possession following it might do so, but that it did not specify that the regulations for the management of the estate should be binding on the tenant, therefore, assuming a lease was thereby constituted, the whole daughters of Pratt were entitled to succeed to it, and the pursuer alone had no title to sue this action for damages.

HEGGIE v. HEGGIE.—Nov. 26.

Compensation—Partnership—Dissolution of Copartnery.

Walter Heggie charged James Heggie for payment of a debt of L.150. A suspension of the charge was raised on the ground that Walter was due to the suspender a larger sum, by which the debt charged for was more than compensated, being a debt due to the dissolved firm of James and John Heggie, of which the suspender was in right of one-half. The terms of the arrangements between the parties, and the dissolution of the firm of John and James Heggie, were proved. *Held* that the suspender was entitled to compensate the claim of the charger, by his claim against the charger for the half of the debt due to John and James Heggie, which, on the dissolution of that firm, had vested in the suspender *sui juris*.

WHITE v. ROBERTSON.—Nov. 24.

Imprisonment—Aliment—Act of Grace—Re-Incarceration after Liberation.

White was imprisoned for debt at the instance of Robertson on 19th May. On 16th June, he obtained an order against the incarcerating creditor for consignment of aliment at the rate of 1s. 6d. per diem. A sum was accordingly consigned; but, on 11th August, only 6d. of the sum remained. On the morning of that day, he obtained, without intimation to the incarcerating creditor, a certificate of no aliment, from the governor of the jail, and a warrant of liberation from the Sheriff, and was set at liberty. He was again apprehended, however, and was re-committed to prison on the same diligence, and for the same debt immediately afterwards, and without any change in his circumstances. He then presented the note of suspension and liberation, on the ground that such a proceeding was illegal and oppressive. The respondent stated, that a sum of L.3 had been sent on the 11th, and pleaded that the liberation had been premature, and that the certificate of no aliment should not have been granted, without intimation to him, or so long as any part of the sum consigned remained. The Court held—that the liberation had been irregular and premature, and adhered to an interlocutor by the Lord Ordinary on the 1st (Lord Curriehill), refusing the note, with expenses.

Complainer's Authorities.—Morison, 3d June 1826; M'Kenzie, 14th Jan. 1830, 8 Sh. 306; Crawford, 11th March 1836, 14 Sh. 688.

Authority for Respondent.—Pender v. M'Arthur, 28th Jan. 1846; Denovan, 1st February 1845, 7 D. 378.

English Cases.

MARRIAGE—Promise to Marry—Impediment.—In an action for damages for breach of promise of marriage, defendant pleaded, that after the promise he became afflicted with dangerous bodily disease, which had occasioned frequent and severe bleeding from the lungs, by reason of which he was incapable of marriage without great danger of life, and therefore unfit for the married state. The Court of Q. B. were equally divided as to whether this was a good answer to the action. Erle, J. (with whom Wightman, J., concurred).—The plaintiff contends that a contract to marry is not subject to implied conditions peculiar to itself, and that a reasonable time for marrying is to be measured by the lapse of time, and not by the circumstances of each party; and that when the time is come, the woman has a right either to a husband, or to damages in lieu thereof; and that the fatal consequences of the marriage

the husband is either immaterial to the wife, or a ground for greater damage, a widow may get more of her former husband's assets than a wife. But there is no authority to support this view, and there seems to me to be much reason and authority against it. A contract to marry has some peculiar incidents arising from its nature; the contract has been held to be avoided by the immorality of the plaintiff, whether man or woman, per Lord Kenyon, in *Wilkes v. Sellway*, 3 Esp. 236; per Abbott, C. J., in *Irvine v. Greenwood*, C. and P. 360; by brutal and violent manners and threats of ill-usage by the man, per Lord Ellenborough, in *Leeds v. Cook*, 4 Esp. 258; by the bad character of the man, per Gibbs, C. J. in *Baddeley v. Mortlock*, 1 Holt N. P. Rep. 151; such ill-health as an aggravated abscess on the breast of the man, per Lord Kenyon, in *Atchinson v. Baker*, Peake's Add. Cas. 103. All these judges have assumed that the purpose of the contract was comfort in cohabitation, and that some causes of probable misery rendered it void. The French law, according to Pothier, admitted ill-health to a certain degree to avoid the contract. These are cases of bodily disease and moral disease; there is no doubt that intellectual disease would avoid it, as the marriage would be void if the mind was unsound. It has also been held that the cause of action for breach of promise of marriage dies with the person, and cannot be enforced by the executor.—(*Chamberlain v. Williamson*, 2 M. and S. 408.) The principle to be deduced from these cases seems to me to be, that a contract to marry assumed in law to be made for the purpose of mutual comfort, and is avoided by the act of God or the opposite party, the circumstances are so changed as to make intense misery instead of mutual comfort the probable result of performing the contract. Within this principle the plea here is a valid defence. The near approach of death by a fatal disease precludes any hope of mutual comfort from cohabitation, and if death is knowingly hastened thereby, each party by performing the contract might incur the criminal guilt of intentionally causing death. Thus far I have considered the case as if the contract had been to marry on a given day, and on that day the defendant did not marry, being prevented by dangerous illness. But the promise here was to marry in a reasonable time, and on such a promise the circumstances of each party are to be considered in deciding when the reasonable time has arrived. The test lies not in the number of days, but in the reasons that produced the delay originally, and the alteration in the situation of the parties when the time is supposed to have arrived. On such a contract it is in the extreme unreasonable to say that the time for performing it is come, when immediate death would be a probable consequence of doing so, and when, if delay was permitted, either health might be restored or the release by death obtained. If the defendant was confined by a dangerous wound, from which he might recover if he rested awhile undisturbed, it seems to me certain that he would have a right to some delay; and whether the wound in the lungs be by a deadly wound or a deadly disease, if the consequence to health are the same, the right of the party to an extension of the time ought to be the same. I have taken the plea as if notice had not been averred; and I am of opinion, on the reasons above given, that the defendant is entitled to succeed on this defence, although he gave no notice of his state before this plea was pleaded. Lord Campbell, C. J. (with whom Crompton, J., agreed) said—Here the defendant does not seek to excuse himself for refusing to marry the plaintiff within a reasonable time, giving her notice of the temporary impediment, but considers the contract as *ipso facto* at an end by his supervening bodily incapacity. The counsel for the defendant argued, that in his dangerous state of health, as described in the plea, he is in the same situation as if by disease, or accident, or violence, he had suffered mutilation. In that case he certainly could not have maintained an action against the lady for refusing on that count to marry him. But I am by no means prepared to say, that if she had agreed to be married by him and he had refused to marry her, he would not have been liable to an action. By such a marriage she could not have become

the mother of children; but she might, nevertheless, have been affectionately attached to him, and might innocently have desired to enjoy the consortium *vite* with him; she might have obtained rank and station in society as his wife, and as his widow she might have been dowable of his lands. The defendant suggests the impossibility of entering into the married state under such circumstances; but he may well pay damages for refusing to do so. If the third plea could be considered as in excuse only, without treating the contract as dissolved, I am of opinion that it is bad, for not averring that before, or at the expiration of the reasonable time within which the marriage ought to have been solemnised, the plaintiff had notice of the defendant's dangerous state of health, which constituted the impediment, or at least alleging some reason (as from the suddenness of the illness which overtook) why he did not give her notice. Without any notice to the plaintiff of the defendant's illness, it may not improbably have happened, that when the time for the celebration of the marriage approached she made all usual and becoming preparations for her change of condition, and attired as a bride she may even have expected him at the altar to fulfil his vow. The plea merely alleges that the plaintiff had notice before the commencement of the action; and the jury found that no such notice had been given.—(Hall v. Wright, 31 L. T. Rep. 297.)

STOPPAGE IN TRANSITU.—Goods were shipped by order to A., and by the bill of lading they were made deliverable to A. on paying freight. On the arrival of the goods, being in embarrassed circumstances, and not wishing if he stopped business to accept the goods, he declined to receive them; but they were afterwards landed and locked up in his warehouse, it being his intention to warehouse them for the vendors if he could do so. The vendors then demanded back the goods, on which A. wrote a letter to them, stating that he had consulted his solicitor to ascertain if he could return them, as his affairs were in his creditors' hands, and that his solicitor had informed him that he could not do so. The goods were afterwards assigned to trustees for the benefit of A.'s creditors. Under these circumstances, the Court of Ex. Ch. (affirming the judgment of the Court of Q. B.) held that the acceptance of the goods by A. was complete; the *transitus* was at an end, and the vendors had no power to stop them *in transitu*. The court also held that there was no rescission of the contract between the vendor and the vendee.—(Heinecke v. Earle and Others, 31 L. T. Rep. 357.)

CONTRACT—Agency—Per Procuracion.—The defendant M'Guire carried on business as a corn-factor in London personally, and by his brother, Martin M'Guire, at Limerick, where he had large stores, with his name over the door, and from which Martin shipped grain to him in London. In August 1857, a charter-party was entered into at Limerick, signed "Thos. M'Guire, per pro M. M'Guire." An action being brought on this charter-party against defendant, it was urged that it was signed without authority. It was proved that Martin informed his brother, the defendant, on every occasion of the charter of a ship, and that the brother never chartered a ship without receiving defendant's authority, but that he had not done so on the occasion in question. On these facts, Martin B. directed the jury that they were at liberty to infer from the fact that Martin M'Guire had for a long time signed charter-parties for the defendant, and acted as his agent, that he had authority to sign this charter-party, and that the jury might properly give the amount of damages claimed; and the jury returned a verdict for the plaintiff for L.191, 5s. 9d. A rule having been obtained calling on the plaintiff to show cause why the verdict should not be set aside, the court held the direction to be right. Pollock, C.B. —I think that the manner in which questions of this sort should be decided, whether it be in the case of a bill of exchange or a charter-party, or any commercial instrument whatever, or a contract of sale of merchandise, should be decided on this principle—has the person who is to be charged with liability under this commercial instrument, or with the contract, whatever it may be, has he authorised and permitted the person who has professed to act as his

gent, so to act in such a manner and to such an extent as that from what has occurred publicly the public have a right to reasonably conclude that persons who are dealing with the defendant, would draw from the nature of the facts that the person so acting is a general agent? If that be so, in my judgment the party is bound, although as between him and the agent he takes care to give on every occasion special instructions. And I think it makes no difference whatever whether the agent professes to act in the name of his principal, as if he were the principal, or whether he professes to act as the agent, signing as B. agent for C. D., or whether he professes to act under a power of attorney. The term "procuration" does not appear to me altogether necessarily to imply that it is under procuration. I believe that expression is frequently used by persons who are in employment, and who have no power of doing it at all. All that the expression "per procuration" means is this: "I am an agent not having any authority of my own in the case; I am authorised by my principal to enter into this contract:" and it appears to me that the error, if I may venture to say so, into which my brother Shee has fallen is this, in mistaking or confounding the duty of a man to make the inquiry so as to be satisfied that the party is the agent, with the question whether the information that he obtained is satisfactory or not. The case of *Alexander v. M'Kenzie*, 6 C. B. 766, was chiefly founded upon the prior case of *Atwood v. Munnings*, 7 B. and C. 78, which I perceive was argued by myself on one side, and Lord Wensleydale on the other, a great many years ago; in the case of *Atwood v. Munnings*, the agent was the man's own wife, and the authority was no doubt quite special; it was not the authority that a man gives to a shopman to sell goods during his absence, and to carry on the concern, possibly, while he is abroad; that was the case of a particular and especial authority to perform certain acts in certain specified objects; and therefore the Court expressed itself, particularly *Holyrood, J.*, who spoke with reference to that case, and it frequently appears, that where a judgment is given either by the court or by a particular judge, a form of expression is used with reference to one set of circumstances that really and truly ought to be applicable to different circumstances; and in looking at the cases with reference to the authorities which, in the profession and by the bench, are received with great respect—if you are to know what is the judgment on the case itself, it is not sufficient merely to take the judgment, you must know what were the facts and the circumstances of the case to which the judgment would be applicable, otherwise you would be continually misled. Now there *Holyrooyd, J.*, says, "I agree in thinking that the powers in question did not authorise this acceptance. The word procuration gave due notice to the plaintiffs, and they were bound to ascertain before they took the bill that the acceptance was agreeable to the authority given." There is no doubt, if persons profess to act as trustees and to convey an estate, the person who takes a conveyance from them is bound to ascertain that they had the authority to convey it. But that sort of doctrine is not in the slightest degree applicable to a man carrying on a mercantile concern on behalf of another. It would be monstrous if it was supposed that you cannot go into a shop in Cheap-side and purchase an article without asking the shopman, where you know that he is not the principal, "Sir, let me see the authority you have to sell an article of such value as this, or to sell anything at all." He may be employed merely to sweep the shop; and it appears to be quite idle to apply the doctrine of the necessity of ascertaining whether what a man is doing is within the scope of his authority, to the general matters of the business of life—it would be perfectly absurd. The business of London could not go on if that doctrine was to be applied in that way. Then he says, in that case, and in the case just referred to, *Littledale, J.*, says, "I am of the same opinion. It is said third persons are not bound to inquire into the making of a bill, but that is not so where the acceptance appears to be per procuration." Then you are bound; no doubt, if you meet with a bill, for the first time, accepted by procuration, if you choose to deal with it without making the inquiry, the loss will fall

upon you if it turns out that the party had no authority. But the practical question is, what is the extent of the inquiry that you are to make? and, after making the inquiry, what is the sort of answer that may be satisfactorily given, and which will protect you, though it should turn out that the authority had been exceeded? I apprehend that it is this: if you see a bill accepted by A. on behalf of B. and Co., and you have no dealings with them, and know nothing about them, in all probability a great many persons who might take such a bill, would take it for granted that there was neither forgery nor fraud in the matter, and that they might safely take it. But if you are to comply with what the law requires, and to make the inquiry, to what extent are you to go? I must say I think you are not bound to go to a man and say, "Sir, produce me the power of attorney or authority to accept this bill." If you find a person who has accepted a bill as agent or by procuration, as a clerk in the house, that he has accepted bills of that sort for, from day to day, month to month, and year to year, and done it in the course of his employment in the house in which he is employed regularly as clerk, doing this thing continually—if you find this, you have done enough; you need not ask for a power of attorney or authority; nor need you go to a man and say, "Is this on account of the house." It is quite sufficient. There is no notice of irregularity, no other notice given; in fact, it is accepted by him as the agent of the house, and you find that he is in the house acting as the agent, and recognised as the agent of the house. If you find it done in that way by him as the agent, you need do no more. I should certainly hold, if it turned out that the individual never accepted a bill, except according to a schedule laid before him in the morning of all the bills that were to be accepted, that that would not prevent a party being bound, if there is a bill accepted under those circumstances. Persons are supposed to carry on their business according to the ordinary arrangements of mankind generally; therefore, if a man is permitted to conduct a business as the agent of the defendant was, to conduct it entirely in the absence of the principal, in my judgment it was a question for the jury to say whether, according to the ordinary mode in which business was carried on—aye, and it must be carried on, or it cannot be carried on at all—it is for the jury to say whether the reasonable conclusion to be drawn from these circumstances, was not that the man was a general agent; and if that was the reasonable conclusion, I think the defendant is bound, though it should turn out that he had determined the extent of the agency by all sorts of rules and regulations, which were not consistent. It seems to me, therefore, that the cases cited by my brother Shée do not apply at all to cut down what I have always understood for many years to be the general rule in Westminster Hall, that if a man holds out by his conduct another person as his agent by permitting that person to act in that character in all sorts of ways, and to appear to the world as a general agent, he is to be taken to be the general agent of the party for whom he acts and who is bound by that general agency, though he may have in the particular instance gone beyond his authority. It is perfectly well known that, even in the case of a special agent, if you send a servant to sell goods, or a horse, for instance, if you limit him to the price at which he is to sell it, and he goes to the market and sells it for less, you are bound to sell it, as he was your agent; there even the violation of a particular authority is considered not as rendering the transaction null and void; you had given him authority to do the act he had done, although he may not have acted entirely in conformity with your instructions. Upon those grounds it appears to me that the direction given by my brother Martin was entirely in conformity with the principles of the English law.—(*Smith v. McGuire*, 31 L. T. Rep. 248.)

SALE—Sub-Vendee—Lien.—Goods were sold by one Asken, and allowed to remain in seller's warehouse—the vendee's name being entered in the books as the person to whom they were deliverable. The vendee vended to a sub-vendee; and, on his presenting a delivery order, the seller entered his name in his books as the person in right of the goods, but without informing him thereof.

The sub-vendee gave the vendee bills for the price (which were duly retired); and obtained partial delivery. The vendee having become insolvent, and his acceptances dishonoured—*Held*, that the seller had no lien on the goods resold to the sub-vendee and remaining in his warehouse at the time of the insolvency. "It is established law," (said Lord Campbell), "that if a vendee has a delivery-order from a vendor of goods lying at a warehouse, and he lodges it with the warehouseman, and the warehouseman accepts the delivery-order, the warehouseman becomes the agent of the purchaser, and the vendor cannot set up any lien for the price. That is the result of the cases, and commerce could not be safely conducted unless that principle were acted on. Here the goods are in possession of the defendant as warehouse-keeper. The plaintiff purchases from Askew, has a delivery-order from Askew and lodges it with the defendant, who makes no objection whatever, and says nothing as to his lien, and leads the plaintiffs to believe that he holds the goods for them. If the defendant meant to claim his lien as against Askew, he ought to have communicated that to the plaintiffs; but he says nothing of the sort, and he leads them to believe that, by sending a delivery-order of their own, they may at any time obtain possession of the goods. Therefore the case is the same as if the defendant had by express words said, 'I accept this delivery-order, and hold the goods as your agent.' It is quite clear that, if the plaintiffs had been aware of any contingent lien that might be set up against the insolvent estate of Askew, they would have exercised the right which they immediately possessed of having the goods delivered up to them. Therefore, the title of the purchaser being acknowledged, the purchaser has a right to treat the warehouseman as his agent, and no contingent right of the warehouseman can affect it. This, as observed by my brother Brampton during the argument, is very analogous to the law regarding stoppage *in transitu*, which is very strong to show that a subsequent lien cannot be set up, because an unpaid vendor cannot set up the right of stoppage *in transitu* against a *bond fide* assignee of the bill of lading. Therefore, I think that the plaintiffs are entitled to recover.—(Pearson v. Dawson, 31 L. T. Rep. 177.)

RAILWAY—Passenger's Luggage.—On the 10th Dec. 1856, plaintiff was going down as a passenger by defendants' railway to Tunbridge Wells. He had several small parcels, which he carried in his hands, and one or two larger ones, which he desired to be placed in the luggage-van. He had, in particular, a parcel containing two pots of chocolate, and a small article of Tunbridge ware, wrapped round by two coats and a maul, and secured by a strap. He desired the porter at the station to put a label on this parcel for Tunbridge Wells, and place it in the luggage-van. The porter refused to label the parcel or place it in the van. The station-master was sent for, and he came; but he refused to allow it to be either labelled or placed in the van, and said it must go with him in the carriage. Plaintiff left the parcel in their charge, requiring them to label it and send it on to Tunbridge Wells. On arriving at his destination he found the parcel had not been forwarded. The following day he inquired in London why the parcel had not been sent as directed, and what had become of it. He was referred to the "lost luggage office," and on inquiry, there his parcel was produced, but a demand of 6d. was made for it. This the plaintiff refused to pay, and the defendants kept possession of the property. The same conduct was repeated on subsequent occasions, and he brought an action to recover the parcels. 6 Will IV., c. 75, sect. 131, says, "that without extra charge, it shall be lawful for any person travelling upon or along said railway, to take with him two articles of clothing not exceeding forty pounds weight." The court held that the Company were bound to carry the package under the ordinary responsibilities as carriers. Willis, J., plaintiff, did not prevent the parcels from being put into the carriage absolutely, but from being put in so as to relieve the Company from responsibility. Then the question arises whether he was entitled to have it carried with responsibility resting on the Company, and not on himself. I think that is settled by the 131st section of the Act, which makes it incumbent on the Company to carry articles of clothing to

the extent of forty pounds.—(*Munster v. S. E. Railway Company*, 31 L. T. Rep. 200.)

BOND—Penalty—Contract in Restraint of Trade.—The declaration was on a bond for L.300, setting out the condition and assigning breaches. The condition, after reciting that the defendant and one Brydon had contracted to sell to the plaintiff for L.150 the good will of their business as surgeons, etc., which they had carried on in partnership at Wadhurst, and that upon such sale they had agreed to enter into the said bond, conditioned as thereafter mentioned, stated that, "if either of them, the said G. B. I. or W. A. B., did or should, within the period of three years from the date thereof, either alone or in co-partnership with any other person or persons whatsoever, practise or attempt to practise the professions of surgeon, etc., or carry on or engage in the business of chemist or druggist, etc., within the distance of one mile in any direction from the parish church of Wadhurst aforesaid, etc., then and in any or either of the said cases, if the said G. B. I. or W. A. B., their executors or administrators, or either of them, should and did forthwith well and truly pay or cause to be paid unto the said W. M., his executors, administrators or assigns, the full sum of L.300, without making any deduction or abatement thereof whatsoever, the said bond and obligation should be void and of no effect, or otherwise should remain in full force and virtue." The declaration assigned various breaches in respect of the defendant having attended patients within the defined limits, and averred that he had not paid the sum of L.300. At the trial before Williams, J., at the spring assizes for the county of Sussex, it was proved that the defendant had attended patients within the limits as alleged in the declaration, and by the direction of the judge the verdict was entered for the plaintiff for L.300, with leave for the defendant to move to have the verdict reduced to L.25, that sum being assessed by the jury as the damages recoverable by the plaintiff in case the court should be of opinion that the sum of L.300 was inserted in the bond as a penalty, and not as liquidated damages. The Court held that the L.300 was not a penalty but liquidated damages, and plaintiff entitled to retain verdict for L.300.—(*Mercer v. Irving*, 31 L. T. Rep. 197.)

PUBLIC COMPANY—Shareholder—Mandacious Reports.—A shareholder (Ayre) in the Deposit and General Life Assurance Co. resisted being placed on the list of contributories, on the ground that he was induced to become a shareholder by misrepresentation. It appeared that at a meeting of the Company, the Board presented a false statement of its condition, representing it as flourishing when it was in fact insolvent, and it was resolved to issue new shares, the true object of which was to raise money to carry on the concern. Believing these statements, Mr Ayre was induced to accept some of the new shares, and he actually executed the deed for 200 of them. The M. R. held, that although misrepresentations made by a secretary or manager do not bind the company inasmuch as an officer cannot be considered an agent of the company for the purpose of committing a fraud (unless directed by the company expressly to make such statement), yet that where the company adopts the misrepresentations and circulates them, and thereby induces others to join them, the persons so imposed upon are not liable as contributories. In the present case the Company had brought an action against Mr Ayre for calls due upon his shares, and obtained judgment; and now the M. R. held such judgment not to be binding upon a court of equity, but that it might at least relieve him from further liability as a contributory. The directors, he said, were bound to know the real state of the Company, and it was their duty also to take care that this real and actual position of the Company might be ascertained by the books of the Company, and it would not therefore, in my opinion, have availed the directors if the books had shown a large balance of assets over liabilities, if the real fact was otherwise. But that question does not arise here, for in this case, by the books as they stood, it appeared that even after applying the furniture and selling the premises, they would not be able to discharge all the liabilities of the Company; and in this state of things they publish their report and declare

and pay a dividend of 5 per cent., congratulate the shareholders upon the success of the undertaking, and recommend an issue of new shares, not for the purpose of paying of debts, and the delusive measure of obtaining funds to pay the dividend, but because the loan and agency department which had turned it so highly profitable had not been originally contemplated, and had not been provided for in the paid-up capital, a further amount of which would be required for the full development of this branch of the Company's business, which was so profitable, and which it was so highly desirable to continue and extend. I have no hesitation in saying that that statement was incorrect and misleading, and that it must have deluded any person who believed it into a wholly erroneous opinion of the state of the concern and its future prospects. Whether the directors personally knew that their statements were delusive and untrue is, in my opinion, wholly immaterial. They were bound to know it. They must be held to know it. They were the vouchers to the public of the accuracy of their statements. They were the company itself by its proper organs announcing to the public the state of the concern, and the company can in no benefit and derive no advantage from the fact of having, by such delusive statements, induced strangers to become shareholders of the concern. This had been an ordinary partnership—if, for instance, three partners had held this language to two strangers, and thereby induced those strangers to enter into obligations and embark with them in the concern, whatever might have been the rights of creditors as against such strangers so induced to join with the three original partners, as between those partners and the deluded strangers the latter would be relieved by this court from all obligations which they had thus been induced to enter into. The case is the same here. The statements made by the directors in their official character to a public meeting are the statements of the company. The company, and all the shareholders constituting that company at the time when the statements are made, are bound to those statements as between them and strangers, and no strangers thus induced to take shares can be held to be bound to contribute towards the payment of the liabilities contracted by the company, who, by false statements or by fraudulent concealment, have induced those persons to join them. The first province of a court of equity, as I have often remarked, is to enforce truth in the dealings of all men, a literal adherence to which is the foundation of the extrines of equity. If a man make a promise for the purpose of inducing, and thereby does induce, another to do a particular act and incur liabilities, equity will compel that man to keep that promise. If a man enter into an obligation, equity is not satisfied with a pecuniary payment to discharge it, but compels him to perform the actual obligation he undertook. It is equally the province of equity to prevent any man, or body of men, from gaining any advantage by the assertion of that which is false, or by the suppression of that which is true. This no doubt puts directors of a company frequently in a position of considerable difficulty, as the company may be one which they really believe, and probably truly, will eventually thrive, and which may be wholly destroyed by a complete disclosure of its affairs: but I express my unhesitating opinion that, unless directors do make such full disclosures, not merely may they incur serious consequences to themselves personally, but neither they nor their shareholders can derive any advantage in a court of equity from having, by such means, deluded strangers to join them. In this case I am of opinion that Mr Ayre was so deluded, and that he ought not to be on the list of contributories. —(The Deposit and General Life Assurance Company *ex parte* Ayre, 31 L. T. Rep. 192.)

SLANDER—Blackleg.—Action for being called a "Blackleg."—It was conceded that the words were not actionable. At the trial a witness was asked what "he understood by the word blackleg?" to which the answer was, "a person who cheats at cards." Pollock C.B.—I am of opinion this rule should be made absolute. The question is, whether an action can be maintained for calling

a man a "blackleg," without proof by evidence of special damage. It appears to me that it cannot. There was no evidence given in this case to render the word actionable, if indeed evidence were admissible for such a purpose, which I think it was not. The word "blackleg" has been used long enough to be understood by the public as well as by experts; and in my opinion it is for the judge, and not for a witness, to instruct the jury as to its meaning. I understand "blackleg" to mean a person who gets his living by frequenting race-courses and places where games of chance or skill are played, giving as small odds as he can when he bets or plays; but not necessarily that he is an habitual cheat. It was, therefore, not actionable to call a man a blackleg any more than it was to call him a mere cheat, swindler or villain, all of which no doubt conveyed offensive charges, and subjected the party so named to reproach. The law, however, wisely held that mere words of heat were not actionable unless applied to a man in his trade or followed by special damage. The term blackleg did not necessarily impute indictable practices. It was no doubt applicable to gamblers and cheats, but a man might be a gambler and not a cheat, although the habitual gambler was a reprehensible person. In the Dictionary referred to, "blackleg" was defined as "a word applicable to notorious gamblers and cheats;" but that does not appear to me to advance the case much. One of the witnesses upon the trial of the cause was asked, "What did you understand by the word blackleg?" In my opinion he should have been asked, "Is that the general understanding of the term blackleg?" When an expert is called to explain, the question usually is, "What is the general meaning of that word among those who use it?" It is doubtful whether it is open to the plaintiff to attach to this word by evidence a sense more serious than that which it ordinarily bears; but if he can, the witness does not prove it, for he only gave his own individual idea of the sense, and not that which it would receive generally according to common acceptance. Martin, B.—I am sorry there should be any difference of opinion among the members of the court upon such a point as this, but I have always understood the test to be in these cases where there is no special damage—Do the words spoken impute to the party complaining the commission of an indictable offence, and in what sense was the language understood by the persons present who heard it? If the language used imputes an indictable offence, it is actionable, and all that the party has to prove is the use of the words spoken and the sense, or their understanding of the meaning of them, by those who heard them. The 8 and 9 Vict. c. 103 s. 17, makes every one who cheats at cards or games, and wins, liable to be punished for obtaining money by false pretences. The question is, whether the term "blackleg" means one who, by habitual malpractices, wins money by fraud. I am of opinion that that is its meaning. But let us look at the evidence given at the trial as to what was the meaning given to it by a witness present at the public-house at the time the words were used, and who heard what passed. The witness said he believed or understood it to mean a person who enters into games of cards and cheats at them. Did the words so used imply an indictable offence, and did the bystanders so understand? The learned judge left this to the jury, and they found in the affirmative. I think this was correct, and that the rule should be discharged. Bramwell, B.—I concur in the regret expressed by my brother Martin, that there should be any difference of opinion among us upon this subject; but what we have to ascertain in these cases, in my opinion, is, in what sense the words spoken would be reasonably understood, according to the English language. And if the word used in this case was a proper English word, it was for the judge to determine its meaning; but if a slang term, then an expert may be called. For myself I don't know which it is. If it is English, an innuendo is unnecessary. If it is slang, it is proved that the defendant uttered a word which charged the plaintiff with being a fraudulent gamester. Either way, therefore, I think the action maintainable, and that the plaintiff proved his case, and this rule should be discharged. Watson, B.—I think this rule ought to be made absolute. It

an action for slander, not of a man in his trade, and without special damage. The charge should be, under the circumstances, one for which criminal proceedings could be instituted. What does the word blackleg impute? I certainly cannot find anything in it that imputes a criminal charge; then an answer is given to it in the declaration; but it was not proved. The question the trial should have been of the witness, "What meaning has the term blackleg obtained in common use?" Take the word "cheat"—a word which is not actionable: it would not do to ask a witness what he understood by that word. There was no evidence in this case to show that the general or ordinary understanding of the word "blackleg" was a libellous one; if it meant a professed gamester, who played at cards night and day, it would not be actionable. In *Daines v. Hartley*, 3 Ex. 200, Pollock, C. B. says:—"The proper course for a counsel who proposes to get rid of the plain and obvious meaning of the words imputed to a defendant as spoken of the plaintiff, is to ask the witness not 'What did you understand by those words?' but 'Was there anything to prevent those words from conveying the meaning which ordinarily the words convey?' Because, if there was, evidence of that may be given, and then the question may be put where you have laid the foundation for it. The question then may be put, 'What did you understand by them?' when it appears that something occurred by which the witness understood the words in a sense different from their ordinary meaning. If words are uttered in print, the ordinary sense of those words is to be taken to be the meaning of the speaker; but no doubt a foundation may be laid by showing something which has occurred. Some other matter may be introduced; and then, when that has been done, the witness may be asked, with reference to that other matter, what was the sense in which he understood the words; but the real question, 'What did you understand with reference to such an expression?' we think is not the correct mode of putting the question. In this case no foundation was, I think, laid for the question put to the witness as to what he understood by the word.—(*Barnet v. Allan*, 31 L. T. Rep. 217.) The judges, being equally divided in opinion, the rule would have dropped; but, to enable the parties to take it to a court of error by way of appeal, ordered Rule to be discharged.

SUCCESSOR DUTY.—B., by will dated 1821, devised estates to his brother C. for life, remainder to his nephew D., and died. In March 1848 C. and D. executed a disentailing deed, and apportioned the estates, subject to an annuity of £1000 to D. during the joint lives of himself and C., with remainder to D. for life, and then to his sons in succession. On the death of C. in 1855, D. came into possession of the estates. He was held to be liable to succession duty as successor under the will of B.—(*Attorney-General v. Sibthorpe*, 31 L. T. Rep. 218.)

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QUEEN VICTORIA.



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ACT OF SEDERUNT

FOR

REGULATING THE PROCEDURE OF JUDICIAL FACTORS UNDER
THE STATUTE 19TH AND 20TH VICTORIA, CAP. 79.

25th November 1857.

THE LORDS of COUNCIL and SESSION, in pursuance of the powers vested in them by the 164th and 165th sections of the Act of Parliament passed in the 19th and 20th year of Her present Majesty's reign, cap. 79, intituled, "An Act to amend and consolidate the Laws relating to Bankruptcy in Scotland," Do hereby ENACT and DECLARE, as follows,—

1. That every petition presented to the Court under § 164 of said Statute, for the appointment of a judicial factor on the estates of persons deceased, shall be in the form, and as nearly as may be in the terms, set forth in the Schedule No. I., hereto annexed.

2. That every such petition shall be printed and boxed, according to the present practice, and shall be also boxed for the Accountant in Bankruptcy.

3. Besides intimation on the walls and Minute-Book in common room, of which certificates shall be produced, intimation shall be made in the *Edinburgh Gazette*, according to the forms in Schedule No. II.; and a full copy of the petition shall be served on such of the persons named in the petition, as representatives of the deceased, are not parties thereto; and a copy of the *Edinburgh Gazette*, containing the intimation, and an execution or acknowledgment of service of the petition, shall be produced before the petition is dissolved.

4. The Court shall not make the appointment of the judicial factor, until the lapse of fourteen days, or such other time as the Court may fix, after both the publication of the notice in the *Gazette*, and the date of service (when such service is required) of the petition on the representatives of the deceased. Provided, however, that the Court, if in any case it shall see cause to do so, may make an interim appointment of such factor at any earlier date.

5. The judicial factor, before extracting his appointment, and entering upon the administration of the estate, shall find caution, to the satisfaction of the clerk of Court, for his intromissions and the performance of the duties of his office; and on the bond of caution being executed, it shall be transmitted by the clerk to the Accountant in Bankruptcy.

6. When not otherwise expressed in the interlocutor appointing a judicial factor, the time for finding caution shall be limited to three weeks from the date of appointment, the Court reserving power, on cause shown by application made at any time before the expiry of that period, to prorogate the time for finding caution; and, in case of failure, to find caution within the time thus allowed, the appointment shall *ipso facto* fall.

7. On the death or insolvency of the cautioner of any factor, such factor, on the same coming to his knowledge, shall forthwith give notice in writing to the Accountant in Bankruptcy of such death or insolvency, and the Accountant shall, as soon as the fact shall come to his knowledge by means of such notice or otherwise, require new caution to be found.

8. The factor shall immediately, on extracting his appointment, proceed to inquire into and ascertain the nature and extent of the estate belonging to the deceased, and shall be entitled to enter into immediate possession of the same, and of all writs and documents of importance belonging thereto; and he shall make up such titles to the estate, heritable and moveable, as shall enable him to manage, dispose of, and realize the same in terms of the Statute.

9. In order to ascertain the claims upon the estate the factor shall, within eight days of extracting his appointment, cause to be inserted in the *Edinburgh Gazette*, a notice, in the form, or as nearly as may be, set forth in the Schedule No. III., hereto annexed, and he shall also insert a similar notice in such newspapers as may appear to him to be proper.

10. The factor shall examine the claims of the creditors, in order to ascertain whether the debts are justly due from the estate of the deceased, and may call for further evidence in support of the claims, and may, if he sees fit, require the creditors to constitute the same by decree in a competent Court, in an action to which the factor shall be called as a defender.

11. The factor shall, within six months at latest from the date at which his appointment shall have been extracted, lodge with the Accountant a full inventory of the estate of the deceased, and shall produce therewith or exhibit all such writs and documents of importance belonging to the estate as may have been obtained by him, and shall at the same time report a state of the debts appearing to be due by the deceased, distinguishing those for which claims have been lodged by creditors, and the evidence upon which the same rest, and the claims made and lodged with him by persons interested in the succession of the deceased, and the grounds thereof, and shall append thereto a vidimus of the estate of the deceased, estimating the probable value thereof when realized, and the amount of claims of creditors thereon, and of other persons interested in the succession; and the said inventory, when adjusted and signed, as after mentioned, with the state of debts and vidimus of the estate, shall remain in the possession of the Accountant; and all creditors and persons interested in the succession of the deceased, or their agents, shall have access to see the same in the hands of the Accountant, at his office.

12. The Accountant, before adjusting, approving, and signing the inventory of the estate lodged by the factor, shall examine into the same, and call for all necessary documents, to enable him to ascertain the circumstances of the estate and the sufficiency of the inventory, so that it may form a clear rule of charge against the

factor; and if at any time thereafter any new claims, or property belonging to the estate, shall be discovered, the factor shall report the same forthwith to the Accountant, in order to such addition or alteration being made on the inventory as may thereby be rendered necessary.

13. The inventory of the estate so lodged, when adjusted and approved of by the Accountant, shall be signed by him and the factor, and shall form the charge against the factor; and the Accountant shall then fix within what period the factor shall prepare a state of funds and scheme of division, to be considered and approved of by the Court, with power to the Accountant to prorogate the time for preparing such state of funds and scheme of division as shall seem to him, having regard to the circumstances of the case, to be necessary or expedient.

14. When the factor desires special powers to be granted to him by the Court, he shall submit the proposal by note to the Accountant, who, after making such inquiries as may appear to him to be proper, shall report his opinion thereon in writing, and that report shall be produced with the application to the Court.

15. When the judicial factor shall have prepared the state of funds and scheme of division, he shall lay the same before the Accountant, along with all writings and documents upon which it proceeds, and shall afford to the Accountant all explanations thereon which may be required by him. And the Accountant shall make a report in writing on the said state of funds and scheme of division, containing such observations thereon as he shall think fit and proper to be submitted to the Court.

16. Immediately on the Accountant's report being made, the factor shall lodge the same in Court, and shall transmit to each person who has lodged with him a claim on the estate of the deceased, a notice by post intimating that the state of funds and scheme of division, and report thereon, have been lodged in Court, and stating the amount for which the creditor has been ranked, and whether his claim is to be paid in full, or by a dividend, and the amount thereof, and in case of claims rejected, stating that fact; and a notice, according to the form in Schedule No. IV., hereto annexed, shall also be inserted in the *Edinburgh Gazette*; and if any persons, other than those who have lodged claims with the factor, shall be stated in the petition to the Court, or in the books, deed of settlement, or other papers of the defunct, to be creditors of the estate or interested therein; or if the factor shall otherwise have reason to believe that other persons are in either of these predicaments, he shall give notice by letters, through the post-office, to such persons, that no dividend is allotted to them in the scheme of dividend.

17. All creditors, and other persons interested in the succession of the deceased, shall be entitled to examine the state of funds and scheme of division lodged in Court, and also the claims and the vouchers, or evidence thereof, lodged with the factor; and any credi-

tor, or other person, dissatisfied with the state of funds and scheme of division, may lodge a note of objections thereto, signed by counsel, with the clerk of the process, within three weeks from the last date of such notices; and till the lapse of said period of three weeks, the Court shall not be moved to approve of the state of funds and scheme of division.

18. If objections are lodged to the state of funds and scheme of division, the Court shall dispose of the same, after hearing counsel for the objecting creditors and judicial factor, and making all necessary investigation in regard to the same. If the objections be sustained to any extent, the necessary alteration shall be made on the said state and scheme.

19. When the scheme of division is adjusted, it shall be approved of by the Court; and the factor shall pay, deliver, or convey to the parties therein set forth, the sums or subjects allocated to them respectively in the said scheme of division.

20. Where a partial division of funds among the creditors who have claimed may be made with safety to the interests of all concerned, the judicial factor may, with the approval of the Accountant, prepare a state of the funds and first scheme of division, and that at as early a period after the time notified for lodging the claims of creditors upon the estate, as he may be enabled to do it; and the same having been submitted to the Accountant, and reported on by him to the Court, and notice having been given, in terms of section 16, to each creditor, of such state of funds and first scheme of division having been lodged, the Court may, six months having elapsed from the day of the death of the deceased, on considering the same, approve of that scheme of division, and the factor shall pay, deliver, or convey, in terms thereof; *provided always*, that dividends corresponding to the amount of the claims of creditors, whose debts have not, at that period, been admitted by the judicial factor, or whose debts are future or contingent, and also the full amount of such debts as are claimed as preferable, but the preference is not admitted by the factor, shall be retained and set apart to meet such claims, if ultimately sustained, or when the same shall become payable or prestable.

21. The judicial factor shall lodge all the money coming into his hands in some one of the banks in Scotland established by Act of Parliament or Royal Charter, in a separate account, or on deposit, such account or deposit being in his own name, as judicial factor on the estate; and the factor shall not keep in his hands more than L.50 of money belonging to the estate for more than ten days; and it shall be the duty of the Accountant to report to the Court any failure of the factor in this respect.

22. The factor shall be entitled, out of the first of the funds realized by him, and without waiting for the expiry of six months from the death of the deceased, to pay the deathbed and funeral expenses of the deceased, rent, taxes, and such servants' wages as are privileged debts, and interest becoming due, or past due, to creditors having preference over the estate.

23. When the inventory of the estates of the deceased shall be lodged by the factor with the Accountant, a term shall be fixed by the Accountant for the factor lodging his first account of charge and discharge of his intromissions with the estate, together with an account current, showing the state of the money in his hands from day to day, in order to the same being examined and audited by the Accountant; and so long as the factor's management of the estates continues, he shall, once a year or oftener, as the Accountant may direct (the dates to be fixed by the Accountant), render to him similar accounts of charge and discharge of his intromissions with the estate and accounts current, and which accounts shall be accompanied with all proper vouchers, and be audited by the Accountant.

24. The Accountant, on auditing the accounts, shall fix the amount of the factor's commission for the period embraced by the audit; and if he has made any corrections on the account, he shall, if required by the factor, explain such corrections, and his reasons for making them.

25. The factor, when he shall find it to be necessary to have the services of a law-agent in matters properly belonging to that profession, shall be entitled to employ one not connected with him as a partner, whose accounts shall, by an order of the Accountant, be submitted to the Auditor of Court for taxation, reserving to the Accountant to disallow, upon grounds to be specified by him, the whole or any part of accounts incurred to a law-agent, but such disallowance to be subject to the review of the Court, on objections thereto by the factor; and a note of such objections shall be lodged and boxed within ten days of the Accountant's deliverance being intimated to the factor, or his known agent.

26. Any outlays incurred by the Accountant, in regard to special reports made by him to the Court, shall, by order or decree of the Court, form a charge against the estate, and shall be satisfied and paid by the factor, the account for such outlays being first audited by the Auditor of Court, unless the Court shall see cause to subject the factor personally in the whole or any part of such outlay of the Accountant, in which case the factor shall be bound to relieve the estate of such outlay.

27. If the factor shall misconduct himself, or fail in the discharge of his duty, he shall be liable to the forfeiture of the whole or any part of his commission, and to removal from his office, and to payment of expenses, or to one or more of these penalties, as the Court may determine, besides being liable in reparation of any loss or damage sustained by the estate in consequence of his misconduct or failure.

29. When the factor shall apply to the Court for his discharge, he shall present a petition to the Court, with a report by the Accountant regarding his management of the estate, and his right to be discharged of his office. That petition shall be intimated to the representatives of the deceased; and a notice thereof shall be inserted in the *Edinburgh Gazette*, in the terms of the Schedule No.

V., hereto annexed; and the petition shall not be disposed of until the lapse of fourteen days after such publication in the *Gazette*; and after such inquiry as may be necessary, the Court shall dispose of the petition; and, if the Court shall grant the discharge, they shall order the bond of caution to be delivered up.

30. All proceedings which in this Act are appointed to take place by or before the Court, shall, although the same be addressed to the Lords of Council and Session, be brought before, dealt with and disposed of by, the Junior Lord Ordinary officiating in the Outer House, or by the Lord Ordinary officiating on the Bills in time of vacation, subject to the review of the Inner House, in conformity with the 4th section of the Statute 20th and 21st Victoria, cap. 56.

And the Lords appoint this Act to be engrossed in the Books of Sederunt, and to be printed and published in the usual form.

DUN. McNEILL, *I.P.D.*

APPENDIX.

No. I.

_____ Division.

_____ Clerk.

Unto the Right Honourable the Lords of Council and Session,

The PETITION of [*here state the names and designations of the Petitioners, and whether they apply in the character of creditors or of persons having interest in the succession of the party deceased.*]

Humbly Sheweth,

That [*naming and designing the party deceased*], died on the day of _____ and left no settlement, appointing trustees or other parties to manage his estate, or part thereof (or that the trustees, or other parties appointed by him to manage his estate, have not accepted or acted).

That the petitioner (or petitioners) [*here state, if creditors, the nature and amount of the debt due to them by the deceased; and how constituted, vouched, or established, and referring to the evidence of the existence of the debt, as produced with the petition; or, if persons having an interest in the succession, the nature of their interest in the succession.*]

That the estate of the said deceased so far as known to the petitioner (or petitioners), consists of [*here state the nature of the estate, whether of heritable or moveable, stock in trade, interest in a partnership, professional business, or whatever*]

else it may be.—State any other facts which may appear to be of importance in the particular case.]

That the following persons are, to the best of the petitioner's knowledge and belief, the legal representatives of the deceased, or have an interest in his estate. [*Here state the names and designations of those persons, their degree of relationship, or the nature of their interest in the succession.*]

That the following persons are, to the best of the petitioner's knowledge and belief, all the creditors of the deceased [*name and design them.*]

That the Petitioner is (or *petitioners are*) entitled, under Section 164 of the "Bankruptcy (Scotland) Act, 1856," to make the present application for the appointment of a judicial factor over the estate of the said deceased, with the powers therein conferred.

May it therefore please your Lordships to appoint intimation of this petition to be made on the walls, and in the Minute-Book, in common form, and in the *Edinburgh Gazette*, and otherwise in such other form and way, and to such persons, as to your Lordships may seem fit; and thereafter, on resuming consideration of the same, to appoint such fit person as to your Lordships shall seem proper to be judicial factor on the estate of the said deceased ; and that, with all the powers of the Statute; he always finding caution before extract; or to do otherwise in the premises, as to your Lordships shall seem proper.

(Signed by Counsel.)

No. II.

Notice to be Inserted in the Edinburgh Gazette.

To the Creditors and other persons interested in the succession of the deceased
(*naming and designing him.*)

A PETITION has been presented to the Court of Session, Division, Mr Clerk, by a creditor (or *creditors*), to the amount required [*or by having an interest in the succession of the said deceased*], the said deceased having left no settlement appointing trustees, or other parties having power to manage his estate (or as the case may be, *the trustees, under the deceased's settlement, not accepting or acting*), praying, under the Act 19 and 20 Vict., cap. 79, § 164, for the appointment of a Judicial Factor upon said estate; and which Petition will be again moved in Court, on or after the day of , of all which notice is hereby given.

(Date)

(Signature of Petitioner's Agent, and adding his place of Business.)

No. III.

To the Creditors and other persons interested in the succession of
the deceased (*designing him.*)

A. B. (*naming and designing him*), having been appointed by the Court of Session Judicial Factor on the estate of the said deceased under the Act 19 and 20 Vict., cap. 79, § 164, requires all the lawful Creditors of the said and other persons interested in his estate, to lodge with the Judicial Factor,

within four months after the date of this notice, a statement of their claims as creditors of the deceased, or as otherwise interested in his estate; with such vouchers or other written evidence as they may have to found upon in support of their claims; in order to the same being considered and reported upon by the Judicial Factor.

(Date)

(Signature and address of Judicial Factor.)

No. IV.

To the Creditors and other persons interested in the succession of
the deceased (*designing him.*)

A. B. Judicial Factor upon the Estate
of the said deceased hereby intimates
that he has prepared and lodged in Court,
Division, Mr Clerk, a State of Funds and Scheme
of Division of the said Estate, to be considered and approved of by
the Court, of which all concerned are hereby required to take notice.

(Date)

(Signature and address of Judicial Factor.)

No. V.

To the Creditors and other persons interested in the succession of
the deceased (*designing him.*)

A. B. Judicial Factor on the Estate of
the deceased has presented a Petition
to the Court of Session, Division, Mr Clerk,
for his discharge of the office of Judicial Factor, of which notice is
hereby given, and that the Petition will be again moved in Court
on or after the day of

(Date)

(Signature and address of Judicial Factor.)

ACT OF SEDERUNT

TO

REGULATE THE BUSINESS OF THE OFFICE OF CLERK OF
THE BILLS.

EDINBURGH, Feb. 10, 1858.

THE LORDS of COUNCIL and SESSION, taking into consideration that, by an Act passed in the 20th and 21st years of Her present Majesty, c. 18, intituled "An Act to Regulate Procedure in the Bill-Chamber in Scotland," the office of one of the Clerks of the Bills in the Bill-Chamber has been abolished, and it is provided, that there shall in future be only one Clerk of the Bills, who shall discharge all the duties attached to the office; and that, by the said Act, the said Lords are empowered and required to make such provision, by Act of Sederunt, as they may deem necessary or expedient, for the performance of the business of the Office of the Clerk of the Bills, and are empowered also to make, from time to time, by Act of Sederunt, such alterations and further provision for the same as they may deem fit—Do therefore ENACT and DECLARE, that on and after the 15th February 1858, the following Regulations shall take effect:—

I. The hours of attendance in the Bill-Chamber, during the sitting of the Court, shall be as follows: From 10 o'clock forenoon to 12 o'clock noon, and from 2 to 4 o'clock afternoon, except on Saturdays, when there shall be no afternoon attendance.

II. During Vacation, the hours of attendance in the Bill-Chamber shall be from 10 o'clock forenoon to 12 o'clock noon, and from 2 to 4 o'clock afternoon, except on Saturdays, when there shall be no afternoon attendance.

III. At 4 o'clock afternoon during Session, and 3 o'clock during Vacation, the Clerk of the Bills shall transmit to the Lord Ordinary's house the papers to be advised; and at the same hours, the Clerk of the Bills shall attend the Lord Ordinary with papers lodged in the afternoon requiring despatch.

IV. During Session the Clerk of the Bills shall attend at the Lord Ordinary's Bar and in court from 10 o'clock forenoon till 2 o'clock noon, and thereafter as long as any Bill-Chamber case

requires to be attended to there. He shall lay the papers lodged with him before the Lord Ordinary, and write the interlocutors thereon, and if certificates of the interlocutors are required immediately, he shall furnish them to the Agent. He shall attend all hearings and debates, and write the interlocutors in all cases not taken to avizandum. He shall receive the advised papers from the Lord Ordinary's Clerk, and, as soon as possible, shall send them to the Register Office. During Session, when the Lord Ordinary is not in Court, and during Vacation, he shall transact the above business with the Lord Ordinary during the same hours, attending at the Register Office when not required at the Judge's house.

V. All extracts of interlocutors pronounced by the Lord Ordinary or the Court under the Bankruptcy (Scotland) Act 1856, and Bankruptcy and Real Securities Act 1857, shall be prepared and issued by the Clerk of the Bills in the same manner as extracts were formerly issued under the Statute 2d and 3d Victoria, cap. 41.

VI. The Clerk of the Bills shall discharge all the duties attached to the office, and which were formerly in use to be discharged by the Court Clerk and the Office Clerk.

VII. All former Acts of Sederunt at present subsisting in relation to proceedings in the Bill-Chamber, in so far as not hereby altered, shall continue in force.

And the Lords appoint this Act to be inserted in the Books of Sederunt, and to be printed and published in common form.

DUN. M'NEIL, *L.P.D.*

ANNO VICESIMO PRIMO
VICTORIÆ REGINÆ.

CAP. XX.

An Act for granting a Stamp Duty on certain Drafts or Orders for the Payment of Money.—[21st May 1858.]

Most Gracious Sovereign,
WE, Your Majesty's most dutiful and loyal Subjects, the Commons of the United Kingdom of *Great Britain* and *Ireland* in Parliament assembled, towards raising the Supply granted to Your Majesty, have freely and voluntarily resolved to give and grant unto Your Majesty the Stamp Duty herein mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted; and be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. From and after the Twenty-fourth Day of *May* One thousand eight hundred and fifty-eight, all Drafts or Orders for the Payment of any Sum of Money to the Bearer on Demand, which being drawn upon any Banker, or any Person or Persons acting as a Banker, and residing or transacting the Business of a Banker, within Fifteen Miles of the Place where such Drafts or Orders are issued, are now exempt from Stamp Duty, shall be chargeable with the Stamp Duty of One Penny for every such Draft or Order.

After 24th
May 1858,
certain
Drafts to
be charge-
able with
a Stamp
Duty of 1d.

II. The Duty by this Act granted shall be under the Care and Management of the Commissioners of Inland Revenue for the Time being; and all the Powers, Provisions, and Regulations, Pains and Penalties, contained in or imposed by any Act or Acts relating to any Duties of Revenue.

The Duty
to be under
the Care of
the Com-
missioners
of Inland
Revenue.

Powers
and Pro-
visions of
former
Acts to
apply to
this Act.

the same Kind or Description payable in *Great Britain* and *Ireland* respectively, and in force at the Time of the passing of this Act, shall respectively be in full Force and Effect with respect to the Duty by this Act granted, and to the Paper and Instruments chargeable therewith, so far as the same are or shall be applicable, and shall be observed, applied, enforced, and put in execution for and in the collecting and securing of the said Duty hereby granted, and otherwise in relation thereto, so far as the same shall be consistent with the express Provisions of this Act, as fully and effectually to all Intents and Purposes as if the same had been herein repeated and specially enacted with reference to the said Duty by this Act granted.

REGULATIONS

RELATIVE TO

PRODUCTIONS AT TRIALS OF EXCHEQUER CAUSES.

WITH a view to carry into Execution the purposes of the Act 19 and 20 Victoria, Cap. 56, it is hereby ordered, in terms of 44th section of the said Statute :—

I. That all Goods and Articles seized, connected with the Cause, may be produced, put in evidence, and made use of at the Trial, notwithstanding they have not been previously lodged with the Depute or Assistant Clerk; provided always, that reasonable access to such Goods and Articles shall be given to the Parties in the Cause, on application, for eight days before the Trial.

II. That all Writings, Plans, Maps, Models, or other Productions, may be put in evidence, and made use of at the Trial without being previously lodged with the Depute or Assistant Clerk; provided always, that a written Notice, containing a List thereof, and specifying where, and in whose custody, to the best of the knowledge and belief of the Party giving the Notice, such intended Productions are, shall be given to the opposite Party, or his Agent in the Cause, eight days before the Trial; and that, on application, access shall be given to such Party or Agent to the Productions contained in such List, in so far as in the custody or power of the Party giving the Notice; and provided that Productions, of which such Notice has not been previously given, may of consent be put in evidence at the Trial, or may on special grounds be directed to be put in evidence at the Trial by the presiding Judge.

III. That it shall be competent for any Party citing Witnesses or Havers to a Trial, to cause to be annexed to the Citation of such Witnesses or Havers, a List or Specification of Writings, Maps, Plans, Models, or other Productions, which such Witnesses or Havers are called upon to produce at the Trial; and such Witnesses and Havers, when so cited, shall be bound to bring with them to the Trial the Writings and others mentioned in such List or Specification.

(Signed)

DUN. McNEILL.

J. MONCREIFF.

JAS. CRAUFURD.

EDINBURGH, *February* 26, 1858.

ACT OF SEDERUNT

TO REGULATE

BORROWING AND RETURNING OF PROCESSES AND RELATIVE MATTERS, AND THE ATTENDANCE OF THE CLERKS AT THE REGISTER HOUSE.

EDINBURGH, 7th July 1858.

THE LORDS OF COUNCIL AND SESSION, considering the expediency of better regulating the borrowing and returning of Processes, and relative matters, and the attendance of the Clerks at the Register House, do hereby enact and declare as follows:—

1. In addition to the Inventory at present in use, and separate Inventories of Productions, a full Inventory, with corresponding numbers, but in a consecutive form, to be called Duplicate Inventory, shall be provided and kept, in which shall be entered each step of Process, including each Production. The principal Inventory, and all separate Inventories, shall, at all times, remain with the Clerk to the Process, and be accessible in his hands only; and it shall be the duty of the Agent, who is at present bound to lodge a Process Inventory, to provide and lodge at the same time the above duplicate Inventory, which duplicate shall at all times accompany the Process, when borrowed and returned, and when sent to *avizandum*; and it shall be the duty of the Agent returning the Process, to keep such duplicate Inventory complete, by adding thereto, on each occasion, the additional pleadings and productions lodged for his client,—the Agent being, in all cases, entitled, in respect of such duplicate Inventory, to the same copying fees, according to the length, which he would otherwise be entitled to, under existing regulations, in respect of copying a Process Inventory or Inventory of Productions.

2. The Clerks shall (except as after mentioned) receive back no Process, or part of a Process, without at once either comparing it with the principal Inventory and Receipt in presence of the Agent or his Clerk, and scoring the Receipt; or, in the case of a partial return, marking on the principal Inventory the numbers so returned; or otherwise, if the whole numbers borrowed be not then returned, or if the Process be bulky so that it cannot, at the time, be conveniently examined, the Clerks shall not receive back such Process, or part of a Process, without a separate slip or note accompanying the

same, dated and signed or initialed by the Agent or his Clerk, specifying the numbers so returned; and it shall be the duty of the Clerk, in all cases where he receives back a Process, or part of a Process, without at once scoring the Receipt, or making a marking on the Inventory as aforesaid, as the case may be, to examine the same before the close of the following day at latest, and to give notice to the Agent of any inaccuracy, if there be such, in the slip or note aforesaid, and if no notice to the Agent be delivered or put into the Post-Office, in the course of such following day, stating that such slip or note is inaccurate, the accuracy thereof shall be presumed, and the Agent shall be equally exonerated as if the Receipt had been scored, or a marking made as aforesaid.

3. It shall be the duty of the Agent returning the whole or any part of a Process, to see that, in all cases, the numbers so returned are previously arranged in their regular order according to the Inventory, and the Clerk may refuse to receive any Process, or part of a Process, the numbers of which are not so arranged. The business of each Agent or his Clerk shall, in all cases, be attended to in the order in which they enter the Office.

4. The foregoing Rules and Regulations shall be equally applicable to Bill-Chamber cases and procedure, and to the Clerk or Clerks to the Bills, as to other cases and procedure, and to the other Clerks.

5. The Inner House and Outer House Assistant-Clerks shall attend at the Register House, and keep their Offices open for performance of their official duties during the following hours: viz.—In Session time every lawful day from 2 to half-past 3 o'clock P.M., and from 6 to 8 o'clock P.M., with the exception of Mondays, when the hours shall be from 11 o'clock A.M. to 2 o'clock P.M., and from 6 to 8 o'clock P.M., and with the farther exception of Saturdays, when no attendance at the Register House shall be necessary. In time of Vacation or Recess, the hours of such attendance shall be from 11 o'clock A.M. to 1 o'clock P.M. on Tuesdays, Wednesdays, and Thursdays.

6. This Act of Sederunt shall come into operation from and after the 20th day of July current.

7. All existing Rules and Regulations are hereby repealed, in so far as necessary to give effect to this Act of Sederunt, but no farther.

And the Lords APPOINT this Act to be inserted in the Books of Sederunt, and to be printed and published in the usual manner.

DUN. M'NEILL, *I.P.D.*

ACT OF SEDERUNT

MAKING

CERTAIN ADDITIONS TO, AND ALTERATIONS UPON, THE TABLE OF FEES FOR PRACTITIONERS BEFORE THE COURT OF SESSION.

EDINBURGH, 7th July, 1858.

THE LORDS OF COUNCIL AND SESSION considering that the Table of Fees for Practitioners before the Court of Session, which, with certain additions and alterations, was enacted and made perpetual by the Act of Sederunt 17th July 1841, has, in some respects, become unsuitable or inapplicable in consequence of changes since introduced into the forms and mode of judicial procedure, DO HEREBY ENACT and DECLARE, that the said Table of Fees, as presently in force, shall henceforth be acted on, with, and subject to, the following alterations and additions.

There shall be exigible, under the head of "Bill-Chamber Proceedings :"—

For ordering and procuring copies and certified copies of Interlocutors and Extracts, the same charge as in the Outer House.

Under the head of "Outer House Procedure," in place of Article 2d, the following shall be substituted :—

For instructing Counsel (where no fee is paid) and attendance at the calling in the Motion Roll, 6s. 8d. But there shall be no charge for attendance unless the cause be called ; nor where the calling proves abortive, unless this shall occur without fault or neglect of the Agent.

When the case is in the Debate Roll, then at the conclusion of every debate, L.2, 2s. But no other charge shall be made for attendance in respect of the case being in the Debate Roll,—however long the debate may have continued, or however often the case may have been called for such debate,—unless the attendance shall have been unusually and unavoidably prolonged, and the Lord Ordinary shall certify, by marking on the Interlocutor sheet that an extra sum, the amount of which he shall state, should be allowed ; and in such case, the extra sum so certified shall also be chargeable.

Note.—The above charge for the debate is intended also to cover watching when the case is in the Debate Roll without being called.

Under the general head of "Outer House and Inner House," the following shall be added :—

1. For Examining Papers lodged by opposite party, and ascertaining new matter, and to what extent additional information may be required, where no memorial is prepared in consequence, the same fee as allowed for revising papers drawn by Counsel, according to the length.
2. Perusing and Considering Reports obtained under remit, or Productions made or recovered under a diligence, whether copies be afterwards made or not, where no memorial is prepared in consequence, to be charged according to time occupied.
3. Attendance on Reporter with Proceedings, etc., and getting him to accept remit, 6s. 8d.
4. Attendance on Reporter, getting up his Report, and Settling his Fee, 6s. 8d.
5. Attendance on Commissioner under Commission and Diligence, and getting up his Report with Productions, etc., and Paying his Fee, 6s. 8d.
6. Writing Commissions or Diligences against Witnesses or Havers, and other similar writings, and duplicates thereof, when necessary,—first sheet, 6s. ; every other, 4s.
7. Preparing for Hearing or Advising in Inner House, and for Debates in Debate Roll in Outer House, where no memorial is prepared at the stage of the cause, 13s. 4d.
8. For examining Reclaiming Note and Appendix of opposite party, to ascertain correctness thereof, 6s. 8d.
9. For each day in which a case stands in the Inner House Rolls, though not called, 6s. 8d.
10. Drawing Note to Extractor for Extract, Lodging same, Transmitting Process, and Procuring Extract, 6s. 8d.
11. Inquiries, if paper of opposite party lodged, 3s. 4d. But this to be charged only once as to each paper.
12. Attending Consultation with Counsel at Chambers, at any important stage of a cause, where no memorial is charged, 6s. 8d. per hour, over and above the charges for attendance with papers and fee, and fixing the consultation.

The enactments in the table, under the head of "Proceedings in Jury Causes," are hereby repealed, and in place thereof, it is enacted and declared that the same charges shall be allowed in Jury Causes as in other causes in the Court of Session, with the following additions and variations :—

- 1.) In respect a Jury Trial is generally attended with an extra degree of trouble, there shall continue to be allowed (as at present) for the day of Trial, if the Trial shall not exceed four hours, L.2, 2s. ; exceeding four hours, and not exceeding six, L.3, 3s., and for each additional hour above six, 6s. 8d.

- (2.) For perusing Record, Productions, and Precognitions, etc., before Trial, and preparing for same, from 13s. 4d. to L.3. 3s., according to the time occupied and importance of the case.
- (3.) A Copy of the Precognitions for the use of the Agent at the Trial, to be allowed.
- (4.) In addition to the same charge as in ordinary Court of Session cases, for Notices of Motions, there shall be allowed, after Issues are adjusted, for each Notice of Motion lodged in Process, and Boxed to the presiding Judge, 3s. 4d.

PROCEEDINGS in SEQUESTRATIONS under the BANKRUPT ACT.

1. For receiving instructions and explanations to apply for Sequestration, 6s. 8d.
2. Attendance obtaining deliverance on the application, 6s. 8d.
3. Transmitting to Sheriff-Clerk, 3s. 4d.
4. Drawing Abbreviate of Sequestration, and getting same entered in Register of Inhibitions, 6s. 8d.
5. Inserting Advertisement in each Gazette—whether the Edinburgh or London Gazette—besides the usual fees of drawing the Advertisement, according to the length, 3s. 4d.
6. Obtaining deliverance declaring Election of Trustees and Commissioners, 6s. 8d.
7. Taking out Bond of Caution, getting it signed by Trustee and Commissioners, and lodging, 6s. 8d.
8. Taking out Act and Warrant, and transmitting same to Accountant in Bankruptcy, 6s. 8d.
9. Drawing Abbreviate of Trustees' Confirmation, and copying and recording the same, 6s. 8d.
10. Framing Note when first Dividend payable, and List of Commissioners, and lodging same, 6s. 8d.

The other charges in Sequestrations to be the same with charges for similar or analogous business in the Bill Chamber.

And the Lords enact and declare that this Act of Sederunt shall come into operation from and after the 20th day of July current; and they appoint the same to be recorded in the Books of Sederunt, and printed and published in the usual manner for the information of all concerned.

DUN. McNEILL, *I.P.D.*

ANNO VICESIMO PRIMO ET VICESIMO SECUNDO

VICTORIÆ REGINÆ.

CAP. XXVI.

An Act to abolish the Property Qualifications of Members of Parliament.—[28th June 1858.]

WHEREAS by the several Acts and Parts of Acts herein-after mentioned Provisions have been made for requiring, on the Part of Members of the House of Commons elected for *England* and *Ireland* respectively, certain Qualifications in respect of Property: And whereas it is expedient that the said Provisions should be repealed: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. The several Acts and Parts of Acts herein-after mentioned, (that is to say,) an Act of the Ninth Year of the Reign of Queen Anne, intituled *An Act for securing the Freedom of Parliament, by farther qualifying the Members to sit in the House of Commons*, an Act of the Thirty-third Year of the Reign of King George the Second, intituled *An Act to enforce and render more effectual the Laws relating to the Qualification of Members to sit in the House of Commons*, an Act of the Fifty-ninth Year of the Reign of King George the Third, intituled *An Act for further regulating the Qualification of Members to serve in the United Parliament of Great Britain and Ireland*, and an Act of the Session of Parliament holden in the First and Second Years of the Reign of Her present Majesty, intituled *An Act to amend the Laws relating to the Qualification of Members to serve in Parliament*, and so much of an Act of Parliament of *England*, and of an Act of Parliament of *Ireland*, respectively passed in the Fortieth Year of King George the Third, and respectively intituled *An Act for the Union of Great Britain and Ireland*, as provides that the Qualifications in

So much of
9 Anne,
c. 5,
33 G. 2.
c. 20,
59 G. 3.
c. 37,
1 & 2 Vict.
c. 48,
39 & 40 G.
3. c. 67.,
40 G. 3. c.
38, (1.), and
41 G. 3. c.
101., as re-
lates to the
Qualifica-
tion of
Members
elected to
serve in
Parliament
repealed.

Repeal of
Acts, &c.
not to re-
vive any
heretofore
repealed.

respect of Property of the Members elected on the Part of *Ireland* to sit in the House of Commons of the United Kingdom shall be respectively the same as were then provided by Law in the Cases of Elections for Counties and Cities and Boroughs respectively in that Part of *Great Britain* called *England*, unless any other Provisions should thereafter be made in that respect by Act of Parliament of the United Kingdom, and so much of an Act of the Forty-first Year of the Reign of King *George* the Third, intituled *An Act for regulating, until the First Day of May One thousand eight hundred and two, the Trial of controverted Elections or Returns of Members to serve in the United Parliament of Great Britain and Ireland for that Part of the United Kingdom called Ireland, and for regulating the Qualification of Members to serve in the said United Parliament*, as relates to the Qualifications of Members elected to serve in Parliament, shall be repealed: Provided always, that the Repeal of the said recited Acts and Parts of Acts respectively shall not be construed to revive or re-enact any Act or Part of Act heretofore repealed by any of the said Acts or Parts of Acts respectively.

CAP. XLVII.

An Act to Amend the Law of False Pretences.—[23d July 1858.]

WHEREAS it is expedient to amend the Law relating to False Pretences: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Any Person obtain-
ing Signature to Bill
of Exchange, &c.
by False Pretences
deemed guilty of
Misdemeanor.

I. If any Person shall by any False Pretence obtain the Signature of any other Person to any Bill of Exchange, Promissory Note, or any valuable Security, with Intent to cheat or defraud, every such Offender shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to be sentenced to Penal Servitude for the Term of Four Years, or to suffer such other Punishment by Fine or Imprisonment, or by both, as the Court shall award.

CAP. XLVIII.

An Act to substitute One Oath for the Oaths of Allegiance, Supremacy, and Abjuration; and for the Relief of Her Majesty's Subjects professing the Jewish Religion.—[23d July 1858.]

WHEREAS it is expedient that One Oath should be substituted for the Oaths of Allegiance, Supremacy, and Abjuration now required by Law: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. Instead of the Oaths of Allegiance, Supremacy, and Abjuration, where the same are now by Law required to be taken, and taken and subscribed respectively, the following Oath to be taken instead of Oaths of Allegiance, Supremacy, and Abjuration.

'I A.B. do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria, and will defend Her to the utmost of my Power against all Conspiracies and Attempts whatever which shall be made against Her Person, Crown, or Dignity, and I will do my utmost Endeavour to disclose and make known to Her Majesty, Her Heirs and Successors, all Treasons and traitorous Conspiracies which may be formed against Her or them; and I do faithfully promise to maintain, support, and defend, to the utmost of my Power, the Succession of the Crown, which Succession, by an Act, intituled "An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject," is and stands limited to the Princess Sophia Electress of Hanover, and the Heirs of Her Body being Protestants, hereby utterly renouncing and abjuring any Obedience or Allegiance unto any other Person claiming or pretending a Right to the Crown of this Realm; and I do declare, that no Foreign Prince, Person, Prelate, State, or Potentate hath or ought to have any Jurisdiction, Power, Superiority, Pre-eminence, or Authority, ecclesiastical or spiritual, within this Realm: And I make this Declaration upon the true Faith of a Christian.

So help me GOD.'

II. Where in the Oath hereby appointed the Name of The Name of the Sovereign for the Time being, by the Time being to be used in the Oath. Her present Majesty is expressed or referred to, the Name of the Sovereign of this Kingdom for the Time being, by the Time being to be used in the Oath. virtue of the Act "for the further Limitation of the Crown, and better securing the Rights and Liberties of the Sub-

“ject,” shall be substituted from Time to Time, with proper Words of Reference thereto.

Oath appointed by this Act to be taken in the same Cases and in like manner as the present Oaths.

III. The Oath hereby appointed shall be taken and subscribed in the same Cases, and by and before the same Persons, and at the same Times and Places, as the Oaths of Allegiance, Supremacy, and Abjuration are respectively now directed to be taken, and taken and subscribed; and the taking and subscribing of the Oath hereby appointed shall have the like Effect as the taking, and taking and subscribing respectively of the Oaths of Allegiance, Supremacy, and Abjuration would have had if this Act had not been passed; and the Refusal, Neglect, or Omission to take and subscribe the Oath hereby appointed shall be attended with the like Disabilities, Incapacities, Penalties, Liabilities, and Consequences as now by Law provided in the Case of Refusal, Neglect, or Omission to take, or take and subscribe respectively the Oaths of Allegiance, Supremacy, and Abjuration; and all Provisions now in force shall be construed and take effect accordingly: Provided always, that no Person, having before the Commencement of this Act taken the Oaths of Allegiance, Supremacy, and Abjuration, shall be required to take and subscribe the Oath hereby appointed, unless and until he would be by Law required to take the said Oaths of Allegiance, Supremacy, and Abjuration in case this Act had not been passed.

Form of Affirmation for Quakers, &c.

IV. Provided always, That every Person of the Persuasion of the People called Quakers, and every other Person now by Law permitted to make his solemn Affirmation or Declaration instead of taking an Oath, shall, instead of taking and subscribing the Oath hereby appointed, make and subscribe a solemn Affirmation in the Form of the Oath hereby appointed, substituting the Words “solemnly, sincerely, and truly declare and affirm” for the Word “swear,” and omitting the Words “And I make this Declaration upon the true Faith of a Christian. So help me God;” and the making and subscribing of such Affirmation by a Person hereinbefore authorised to make and subscribe the same, with such Omission as aforesaid, shall have the same Force and Effect as the taking and subscribing by other Persons of the Oath hereby appointed.

Persons professing the Jewish Religion to make Declaration in certain Cases.

9 G. 4. c. 17.
8 & 9 Vict.
52.

V. And whereas by a certain Act passed in the Ninth Year of the Reign of King George the Fourth, intituled *An Act for repealing so much of the several Acts as imposes the Necessity of receiving the Sacrament of the Lord's Supper as a Qualification for certain Offices and Employments*, a certain Declaration is prescribed to be taken in the Cases in the said Act mentioned: And whereas by an Act passed in the Ninth Year of the Reign of Her present Majesty, intituled

An Act for the Relief of Persons of the Jewish Religion elected to Municipal Offices, a certain other Declaration was permitted to be taken in certain Cases by Persons professing the Jewish Religion, instead of the Declaration required to be made and subscribed by the said Act of King George the Fourth : And whereas it is right to extend the Benefit of the last-recited Act to all other Cases in which the Declaration set forth in the said Act of the Ninth Year of the Reign of King George the Fourth is by Law required to be taken : Be it enacted, That in all Cases which are not within the Provisions of the said Act of the Ninth Year of the Reign of Her Majesty, in which any other of Her Majesty's Subjects are required by Law to make and subscribe the Declaration set forth in the said Act of the Ninth Year of the Reign of King George the Fourth, Her Majesty's Subjects professing the Jewish Religion shall be required instead thereof to make and subscribe the Declaration set forth in the said Act of the Ninth Year of the Reign of Her present Majesty, which Declaration shall, with respect to such Person professing the Jewish Religion, be of the same Force and Effect as if he made and subscribed the said Declaration by the said Act of the Ninth Year of the Reign of King George the Fourth, and shall be made and subscribed at the same Times and Places respectively, and preserved of Record in the same Manner, as the last-mentioned Declaration is now by Law required to be made, subscribed, and preserved.

VI. Provided also, That nothing in this Act contained shall be held to alter or affect the Provisions of an Act passed in the Tenth Year of King George the Fourth, Chapter Seven, "for the Relief of His Majesty's Roman Catholic Subjects." Act not to affect Roman Catholic Relief Act. 10 G. 4. c. 7.

CAP. XLIX.

An Act to provide for the Relief of Her Majesty's Subjects professing the Jewish Religion.—[23d July 1858.]

Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. Where it shall appear to either House of Parliament that a Person professing the Jewish Religion, otherwise entitled to sit and vote in such House, is prevented from so sitting and voting by his conscientious Objection to take the Oath which by an Act passed or to be passed in the present Session of Parliament has been or may be substituted for the Power to either House of Parliament to modify the Form of Oath to be taken instead of the

Oaths of Allegiance, &c., by a Person professing the Jewish Religion, to entitle him to sit and vote in such House.

As to the Form of Oath in other Cases.

Act not to enable Persons professing the Jewish Religion to hold certain Offices.

Rights of Presentation to any Ecclesiastical Benefice possessed by Persons professing the Jewish Religion to devolve upon the Archbishop of Canterbury for the Time being.

Oaths of Allegiance, Supremacy, and Abjuration in the Form therein required, such House, if it think fit, may resolve that thenceforth any Person professing the Jewish Religion, in taking the said Oath to entitle him to sit and vote as aforesaid, may omit the Words "and I make this Declaration upon the true Faith of a Christian," and so long as such Resolution shall continue in force the said Oath, when taken and subscribed by any Person professing the Jewish Religion to entitle him to sit and vote in that House of Parliament, may be modified accordingly; and the taking and subscribing by any Person professing the Jewish Religion of the Oath so modified shall, so far as respects the Title to sit and vote in such House, have the same Force and Effect as the taking and subscribing by other Persons of the said Oath in the Form required by the said Act.

II. In all other Cases, except for sitting in Parliament as aforesaid, or in qualifying to exercise the Right of Presentation to any Ecclesiastical Benefice in *Scotland*, whenever any of Her Majesty's Subjects professing the Jewish Religion shall be required to take the said Oath, the Words "and I make this Declaration upon the true Faith of a Christian" shall be omitted.

III. Nothing herein contained shall extend or be construed to extend to enable any Person or Persons professing the Jewish Religion to hold or exercise the Office of Guardians and Justices of the United Kingdom, or of Regent of the United Kingdom, under whatever Name, Style, or Title such Office may be constituted, or of Lord High Chancellor, Lord Keeper or Lord Commissioner of the Great Seal of Great Britain or Ireland, or the Office of Lord Lieutenant or Deputy or other Chief Governor or Governors of Ireland, or Her Majesty's High Commissioner to the General Assembly of the Church of *Scotland*.

IV. Where any Right of Presentation to any Ecclesiastical Benefice shall belong to any Office in the Gift or Appointment of Her Majesty, Her Heirs or Successors, and such Office shall be held by a Person professing the Jewish Religion, the Right of Presentation shall devolve upon and be exercised by the Archbishop of *Canterbury* for the Time being; and it shall not be lawful for any Person professing the Jewish Religion, directly or indirectly, to advise Her Majesty, Her Heirs or Successors, or any Person or Persons holding or exercising the Office of Guardians of the United Kingdom, or of Regent of the United Kingdom, under whatever Name, Style, or Title such Office may be constituted, or the Lord Lieutenant or Lord Deputy, or any other Chief Governor or Governors of *Ireland*, touching or concerning the Appointment to or Disposal of any Office or Preferment

in the United Church of *England* and *Ireland* or in the Church of *Scotland*; and if such Person shall offend in the Premises he shall, being thereof convicted by due Course of Law, be deemed guilty of a high Misdemeanor, and disabled for ever from holding any Office, Civil or Military, under the Crown.

CAP. LVI.

An Act to amend the Law relating to the Confirmation of Executors in Scotland, and to extend over all Parts of the United Kingdom the Effect of such Confirmation, and of Grants of Probate and Administration.—[23d July 1858.]

WHEREAS it is expedient to amend the Law relating to the Confirmation of Executors in *Scotland*, and to extend over the United Kingdom the Effect of such Confirmation, and of Grants of Probate and Administration: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. From and after the Twelfth Day of *November* One thousand eight hundred and fifty-eight, the Practice of raising Edicts of Executry before the Commissary Courts in *Scotland*, for the Decerniture of Executors to deceased Persons, shall cease, and it shall not be competent to any Person to obtain himself decerned Executor in virtue of any such Edict raised subsequently to the Date aforesaid.

II. From and after the Date aforesaid every Person desirous of being decerned Executor of a deceased Person as Disponee, Next of Kin, Creditor, or in any other Character whatsoever now competent, or of having some other Person, possessed of such Character, decerned Executor to a deceased Person, shall, instead of applying, as heretofore, for an Edict of Executry from the Commissary, present a Petition to the Commissary for the Appointment of an Executor, which Petition shall be in the Form as nearly as may be of the Schedule (A.) hereunto annexed, and shall be subscribed by the Petitioner or by his Agent.

III. Such Petition shall be presented to the Commissary of the County wherein the Deceased died domiciled, and in the Case of Persons dying domiciled furth of *Scotland*, or without any fixed or known Domicile, having Personal or Moveable Property in *Scotland*, to the Commissary of *Edinburgh*.

IV. Every such Petition, in place of being published at

intimating
Petition.

the Kirk-door and Market Cross, as Edicts of Executry have been in use to be published, shall be intimated by the Commissary Clerk affixing on the Door of the Commissary Court House, or in some conspicuous Place of the Court and of the Office of the Commissary Clerk, in such Manner as the Commissary may direct, a full Copy of the Petition, and by the Keeper of the Record of Edictal Citations at *Edinburgh* inserting in a Book, to be kept by him for that Purpose, the Names and Designations of the Petitioner and of the deceased Person, the Place and Date of his Death, and the Character in which the Petitioner seeks to be decerned Executor, which Particulars the Keeper of the Record of Edictal Citations shall cause to be printed and published weekly, along with the Abstracts of the Petitions for General and Special Services, in the Form of Schedule (B.) hereunto annexed; Provided always, that to enable the Keeper of the Record of Edictal Citations to make such Publication, the Commissary Clerk shall transmit to him the said Particulars, and to enable the Commissary Clerk to grant the Certificate after mentioned, the Keeper of the Record of Edictal Citations shall transmit to the Commissary Clerk a Copy, certified by the said Keeper, of the printed and published Particulars, all in such Form and Manner and on Payment of such Fees as the Court of Session by Act of Sederunt may direct.

Certificate
of Intima-
tion of
Petition.

V. The Commissary Clerk, after receiving the certified Copy of the printed and published Particulars, shall forthwith certify on the Petition that the same has been intimated and published, in Terms of the Provisions of this Act, in the Form of Schedule (C.) hereunto annexed, and such Certificate shall be sufficient Evidence of the Facts therein

Additional
Intimation
of Petition
in certain
Cases.

set forth: Provided always, that where a Second Petition for Confirmation is presented in reference to the same Personal Estate, the Commissary shall direct Intimation of such Petition to be made to the Party who presented the First Petition:

Procedure
on Petition.

VI. On the Expiration of Nine days after the Commissary Clerk shall have certified the Intimation and Publication of a Petition for the Appointment of an Executor as aforesaid, the same may be called in Court, and an Executor decerned, or other Procedure may take place, according to the Forms now in use in case of Edicts of Executry, and with the like Force and Effect; and Decree Dative may be extracted on the Expiration of Three lawful Days after it has been pronounced, but not sooner: Provided always, that nothing herein contained shall alter or affect the Law as to Executors finding Caution; and that Bonds of Caution for Executors may be partly printed and partly written.

Decree
Dative.

Proviso as
to Caution.

VII. Provided always, that nothing herein-before contained shall alter or affect the Course of Procedure now in use before the Commissaries in Confirmations of Executors Not to affect present Procedure.
Nominate.

VIII. Inventories of Personal Estates of deceased Persons and relative Testamentary Writings may be given up and recorded in, and Confirmations may be granted and issued by, any Commissary Court to which it is competent to apply in virtue of the Provisions of this Act for the Appointment of an Executor Dative to the Deceased. Where Inventories, &c., may be recorded. Confirmations may be granted.

IX. From and after the Date aforesaid it shall be competent to include in the Inventory of the Personal Estate and Effects of any Person who shall have died domiciled in *Scotland* any Personal Estate or Effects of the Deceased situated in *England* or in *Ireland*, or both : Provided that the Person applying for Confirmation shall satisfy the Commissary, and that the Commissary shall by his Interlocutor find that the Deceased died domiciled in *Scotland*, which Interlocutor shall be conclusive Evidence of the Fact of Domicile : Provided also, that the Value of such Personal Estate and Effects situated in *England* or *Ireland* respectively shall be separately stated in such Inventory, and such Inventory shall be impressed with a Stamp corresponding to the entire Value of the Estate and Effects included therein, wheresoever situated within the United Kingdom. Inventory may include Personal Estate in any Part of United Kingdom.

X. Confirmations shall be in the Form, or as nearly as may be in the Form, of Schedules (D.) and (E.) hereunto annexed ; and such Confirmations shall have the same Force and Effect with the like Writs framed in Terms of the Acts of Sederunt passed on the Twentieth *December* One thousand eight hundred and twenty-three and the Twenty-fifth *February* One thousand eight hundred and twenty-four, or at present in use. Form and Effect of Confirmations.

XI. Oaths and Affirmations on Inventories of Personal Estates given up to be recorded in any Commissary Court may be taken either before the Commissary or his Depute, or the Commissary Clerk or his Depute, or before any Commissioner appointed by the Commissary, or before any Magistrate or Justice of the Peace within the United Kingdom or the Colonies, or any *British* Consul. Oaths before whom to be taken.

XII. From and after the Date aforesaid, when any Confirmation of the Executor of a Person who shall in manner aforesaid be found to have died domiciled in *Scotland*, which includes, besides the Personal Estate situated in *Scotland*, also Personal estate situated in *England*, shall be produced in the Principal Court of Probate in *England*, and a Copy thereof deposited with the Registrar, together with a certified Copy of the Interlocutor of the Commissary finding Confirmation produced in Probate Court of England, and sealed, to have the Effect of Probate or Administration.

that such deceased Person died domiciled in *Scotland*, such Confirmation shall be sealed with the Seal of the said Court, and returned to the Person producing the same, and shall thereafter have the like Force and Effect in *England* as if a Probate or Letters of Administration, as the Case may be, had been granted by the said Court of Probate.

Confirmation produced in Probate Court of Dublin, and sealed, to have the Effect of Probate or Administration.

XIII. From and after the Date aforesaid, where any Confirmation of the Executor of a Person who shall so be found to have died domiciled in *Scotland*, which includes, besides the Personal Estate situated in *Scotland*, also Personal Estate situated in *Ireland*, shall be produced in the Court of Probate in *Dublin*, and a Copy thereof deposited with the Registrar, together with a certified Copy of the Interlocutor of the Commissary finding that such deceased Person died domiciled in *Scotland*, such Confirmation shall be sealed with the Seal of the said Court, and returned to the Person producing the same, and shall thereafter have the like Force and Effect in *Ireland* as if a Probate or Letters of Administration, as the Case may be, had been granted by the said Court of Probate in *Dublin*.

Probate or Letters of Administration produced in Commissary Court and certified, to have Effect of Confirmation.

XIV. From and after the Date aforesaid, when any Probate or Letters of Administration to be granted by the Court of Probate in *England* to the Executor or Administrator of a Person who shall be therein, or by any Note or Memorandum written thereon signed by the proper Officer, stated to have died domiciled in *England*, or by the Court of Probate in *Ireland* to the Executor or Administrator of a Person who shall in like Manner be stated to have died domiciled in *Ireland*, shall be produced in the Commissary Court of the County of *Edinburgh*, and a Copy thereof deposited with the Commissary Clerk of the said Court; the Commissary Clerk shall endorse or write on the Back or Face of such Grant a Certificate in the Form as near as may be of the Schedule (F.) hereunto annexed; and such Probate or Letters of Administration, being duly stamped, shall be of the like Force and Effect and have the same Operation in *Scotland* as if a Confirmation had been granted by the said Court.

For securing the Stamp Duties, Probates, &c., to be deemed granted for all the Property in the United Kingdom.

XV. In any of the aforesaid Cases where the deceased Person shall be stated in or upon the Probate or Letters of Administration to have been domiciled in *England* or in *Ireland*, as the Case may be, such Probate or Letters of Administration shall, for the Purpose of securing the Payment of the full and proper Stamp Duties, be deemed and considered to be granted for and in respect of the whole of the Personal and Moveable Estate and Effects of the Deceased in the United Kingdom, within the Meaning of the Act of Parliament passed in the Fifty-fifth Year of the

ign of King *George* the Third, Chapter One hundred and
 erty-four, and of all other Acts of Parliament granting or
 ating to Stamp Duties on Probates and Letters of Ad-
 ministration in *England* and *Ireland* respectively; and the
 fidavit required by Law to be made on applying for Pro-
 te or Letters of Administration in *England* or *Ireland* as
 the Value of the Estate and Effects of the Deceased;
 d also where the Commissary shall in manner aforesaid Inventory
 d that the Deceased was domiciled in *Scotland*, the In- to include
 ntory required by Law to be exhibited and recorded in all such
 Property.

e proper Commissary Court in *Scotland* before obtaining
 onfirmation, or intermitting with or entering upon the
 ossession or Management of the Personal or Moveable
 state or Effects of the Deceased in *Scotland*, shall respec-
 ely extend to and include the whole of the Personal and
 oveable Estate of the deceased Person in the United
 ngdom, and the Value thereof; and the Stamp Duties
 the Time being chargeable on Probates and Letters of
 ministration and on Inventories respectively shall be
 argeable upon any Probate or Letters of Administration
 be granted, and any Inventory to be exhibited and re-
 rded as aforesaid respectively, for and in respect of the
 ole of the Personal and Moveable Estate and Effects of
 : Deceased in the United Kingdom and the Value there-
 ; and the said Affidavit shall also separately specify the
 lue of the said Estate and Effects in *Scotland*.

XVI. For the Purpose aforesaid, and also for granting Provisions
 elief where too high a Stamp Duty shall have been paid of former
 any such Probate or Letters of Administration, or In- Acts to
 ntory, the Provisions contained in Sections Forty, Forty- apply to
 e, Forty-two, and Forty-three, of the said Act passed in the Pro-
 e Fifty-fifth Year of His Majesty King *George* the Third, bates, Let-
 ating to Probates and Letters of Administration granted ters of Ad-
England, and the like Provisions in the Act passed in ministration, and
 ty-sixth Year of the said King, Chapter Fifty-six, relat- Inventories
 g to Probates and Letters of Administration granted in mentioned
 eland, and the Provisions contained in the Act passed in in this Act.
 e Forty-eighth Year of the said King, Chapter One
 undred and forty-nine, relating to Inventories in *Scotland*,
 d also all other Provisions contained in the said Acts re-
 ectively, or in any other Act or Acts relating to Probates
 d Letters of Administration and Inventories respectively,
 all apply to the Probates and Letters of Administration
 hich effect is given by this Act, and to the whole of the
 ersonal and Moveable Estate of the Deceased for or in re-
 ect of which the same shall, in pursuance of this Act, be
 eemed to be granted, wheresoever situate in the United
 ingdom; and also to the Inventories in which the whole

of the Personal and Moveable Estate of the Deceased, wheresoever situate in the United Kingdom, ought, in pursuance of this Act, to be included, in as full and ample Manner as if all such Provisions were herein enacted in reference to such Probates, Letters of Administration, and Inventories respectively.

Affidavits to Domicile to be made on applying for Probate or Administration.

XVII. Provided, That in any Case where, on applying for Probate or Letters of Administration, it shall be required to be stated as aforesaid that the Deceased was domiciled in *England* or in *Ireland*, the Affidavit so as aforesaid required by Law shall specify the Fact according to the Deponent's Belief, which shall be sufficient to authorise the same to be so stated in or upon the Probate or Letters of Administration; Provided also, that any such Statement, and the Interlocutor of the Commissary finding that the Deceased was domiciled in *Scotland*, shall be Evidence, and have effect for the Purposes of this Act only.

Acts of Sederunt to be passed for following out Purposes of this Act.

XVIII. It shall be competent to the Court of Session, and they are hereby authorised and required, from Time to Time, to pass such Acts of Sederunt as shall be necessary and proper for regulating in all respects the Proceedings under this Act before the Commissary of *Edinburgh* and other Commissaries in *Scotland*, and following out the Purposes of this Act, and also the Fees to be paid to Agents before the said Courts, and to the Commissary Clerks and other Officers of Court, and the Expense of Publication of Petitions.

Former Acts of Sederunt repealed if inconsistent with this Act.

XIX. All former Acts, and Acts of Sederunt made in virtue thereof, so far as inconsistent with the present Act, are hereby repealed; and this Act may be amended or repealed by any Act to be passed during the present Session of Parliament, and may be cited as the "Confirmation and Probate Act, 1858."

Interpretation of Terms.

XX. The Word "Commissary" shall include Commissary Depute, and the Term "Commissary Clerk" shall include Commissary Clerk Depute.

SCHEDULES to which the foregoing Act refers.

SCHEDULE (A.)

Form of a Petition for Appointment of an Executor to a deceased Person.

Unto the Honourable the Commissary of [specify the County], the
Petition of A.B. [here name and design the Petitioner];

Humbly sheweth,

That the late C.D. [here name and design the deceased Person to whom an Executor is sought to be appointed] died at [specify Place];

or about the [*specify Date*], and had at the Time of his Death his nary or principal Domicile in the County of [*specify County, or* rth of Scotland," or "without any fixed Domicile," or "without known Domicile," *as the Case may be*].

hat the Petitioner is the only Son and Next of Kin [*or state* *other Relationship, Character, or Title the Petitioner has, giving* *Right to apply for the Appointment of Executor*].

May it therefore please your Lordship to decern the Petitioner Executor Dative quâ Next of Kin to the said C.D. [*or state the other Character in which the Petitioner claims to be appointed Executor*].

According to Justice, &c.,

[*Signed by the Petitioner or his Agent.*]

SCHEDULE (B.)

of Petitions for the Appointment of Executors in Commissary Courts in Scotland.

County.	Name and Designation of Petitioner.	Title of Petitioner.	Name and Designation of Defunct.	Place and Date of Death.
Edinburgh.	A.B., Writer in Edinburgh.	Next of Kin.	C.D., Merchant in Edinburgh.	No. George St., Edinburgh, 1st January 1857.

SCHEDULE (C.)

Form of Certificate by Commissary Clerk of Publication of a Petition for the Appointment of an Executor.

I, A.B., Commissary Clerk [*or "Commissary Clerk Depute," as Case may be*] of the County of [*specify County*], hereby certify that a Petition was intimated by affixing a Copy thereof on the Door of Court-house [*if some other Place has been directed by the Commissary, specify it*], on the [*specify Date*], and by being published by the Keeper of the Record of Edictal Citations at Edinburgh, in the noted Roll of Petitions for the Appointment of Executors in the Commissary Courts of Scotland, printed and published on [*specify Date*].
A.B.

SCHEDULE (D.)

Form of a Testament Dative or Confirmation of the Executor of a Person who has died without naming one.

I, A.B., Commissary of the County of [*specify County*], considering that by my Decree, dated [*specify Date*], I decerned C.D. Executor Dative quâ Next of Kin [*or other Character, as the Case may be*] of the late E.F., who died at [*specify Place*], on [*specify*

Date], and seeing that the said *C.D.* has since given up on Oath an Inventory of the Personal Estate and Effects of the said *E.F.* at the Time of his Death situated in Scotland, [or situated in Scotland and England, or in Scotland and Ireland, or in Scotland, England, and Ireland, as the Case may be,] amounting in Value to Pounds, which Inventory has been recorded in my Court Books of Date [*specify Date*], and that he has likewise found Caution for his Acts and Intromissions as Executor: Therefore I, in Her Majesty's Name and Authority, make, constitute, ordain, and confirm the said *C.D.* Executor Dative quâ [*specify Character*] to the Defunct, with full Power to him to uplift, receive, administer, and dispose of the said Personal Estate and Effects, and grant Discharges thereof, if needful to pursue therefor, and generally every other Thing concerning the same to do that to the Office of Executor Dative quâ [*specify Character*] is known to belong; providing always, that he shall render just Count and Reckoning for his Intromissions therewith when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat [*specify County*], and signed by the Clerk of Court at [*specify Place*], the [*specify Date*].

To be signed by the Commissary Clerk or his Depute, and sealed with the Seal of Office.

SCHEDULE (E.)

Form of a Testament Testamentar or Confirmation of an Executor Nominate.

I, *A.B.*, Commissary of the County of [*specify County*], considering that the late *C.D.* died at [*specify Place*], upon [*specify Date*], and that by his last Will [or other writing containing the Nomination of Executor], dated [*specify Date*], and recorded in my Court Books upon [*specify Date*], the said *C.D.* nominated and appointed *E.F.* to be his Executor, and that the said *E.F.* has given up on Oath an Inventory of the Personal Estate and Effects of the said *C.D.* at the Time of his Death situated in Scotland, [or situated in Scotland and England, or situated in Scotland and Ireland, or situated in Scotland, England, and Ireland, as the Case may be], amounting in Value to Pounds, which Inventory has likewise been recorded in my Court Books of Date [*specify Date*]: Therefore I, in Her Majesty's Name and Authority, ratify, approve, and confirm the Nomination of Executor contained in the foresaid last Will [or other Writing containing the Nomination of Executor]; and I give and commit to the said *E.F.* full Power to uplift, receive, administer, and dispose of the said Personal Estate and Effects, grant Discharges thereof, if needful to pursue therefor, and generally every other Thing concerning the same to do that to the Office of an Executor Nominate is known to belong; providing always, that he shall

under just Count and Reckoning for his Intromissions therewith when and where the same shall be legally required.

Given under the Seal of Office of the Commissariat of [*specify County*], and signed by the Clerk of Court at [*specify Place*], the [*specify Date*].

To be signed by the Commissary Clerk or his Depute, and sealed with the Seal of Office.

SCHEDULE (F.)

I, A.B., Commissary Clerk [*or Commissary Clerk Depute*] of the County of Edinburgh, hereby certify that this Grant of Probate has or these Letters of Administration have] been produced in the Commissary Court of the said County, and that a Copy thereof has been deposited with me.

CAP. LX.

An Act to amend the Joint Stock Companies Acts, 1856 and 1857, and the Joint Stock Banking Companies Act, 1857.
—[23d July 1858.]

WHEREAS by the Nineteenth Section of "The Joint Stock Companies Act, 1857," it is amongst other things provided, ^{20 and 21 Vict. c. 14.} that where a Company is in course of being wound up voluntarily, and Proceedings are taken for having the same wound up by the Court, the Court may, instead of making an Order that the Company should be altogether wound up by the Court, direct that the voluntary Winding up should continue, but subject to such Supervision of the Court, and with such Liberty for Creditors, Contributories, and others to apply to the Court, and generally upon such Terms and subject to such Conditions as the Court thinks just: And whereas it is expedient to make further Provision for enabling companies to be wound up in manner directed by the said Nineteenth Section: And whereas it is expedient to explain and amend the Acts herein-after referred to as the Joint Stock Companies Acts, that is to say, "The Joint Stock Companies Act, 1856," "The Joint Stock Companies Act, 1857," and "The Joint Stock Banking Companies Act, 1857:" Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Short
Title.

I. This Act may be cited for all Purposes as "The Joint Stock Companies Amendment Act, 1858," and it shall be included in the Expression "Joint Stock Companies Acts," as herein-after used, unless there is something in the Context inconsistent with its being so included.

Petition
for wind-
ing up,
subject to
Supervi-
sion.

II. A Petition praying wholly or in part that a voluntary Winding-up may continue, subject to the Supervision of the Court, shall, for the Purpose of giving Jurisdiction to the Court over Suits and Actions, and over the Appointment of a Receiver, be deemed to be a Petition for winding up the Company by the Court; and in determining whether a Company is to be wound up altogether compulsorily or under the Provisions of the said Nineteenth Section, the Court may have regard to the Wishes of the Majority in Number and Value of the Creditors as proved to it by any sufficient Evidence.

Power of
Court in
proceeding
under
Sect. 19,
of 20 & 21
Vict. c. 14,
to appoint
additional
Liquidators.

III. Where any Order is made by the Court, in pursuance of the said Nineteenth Section, for the Continuance of a voluntary Winding-up, the Court may in such Order or in any subsequent Order appoint any additional Liquidator or Liquidators; and any Liquidator or Liquidators so appointed by the Court shall have the same powers, be subject to the same Obligations, and in all respects stand in the same Position as if they had been appointed by the Company: The Court may from Time to Time remove any Liquidator or Liquidators so appointed by the Court, and fill up any Vacancy occasioned by such Removal, or by the Death or Resignation of any such Liquidator or Liquidators: The Court shall in the Appointment of a Liquidator or Liquidators under this Section consult any Creditor or Classes of Creditors it may think expedient to consult for the Purpose of ascertaining what Appointments are most for the Interest of the Creditors.

Effect of
Order of
Court
under
the said
19th Sec-
tion.

IV. Where an Order is made by the Court, in pursuance of the said Nineteenth Section, for the Continuance of a voluntary Winding-up, the Liquidators appointed to conduct such Winding-up may, subject to any Order made by the Court, exercise all Powers given to them, without the Intervention of the Court, in the same Manner as if the Company were being wound up altogether voluntarily; but, save as aforesaid, any Order made by the Court, in pursuance of the said Nineteenth Section, for the Continuance of a voluntary Winding-up, shall for all Purposes, including the Application of any Provision relating to fraudulent Preference, be deemed to be an Order of the Court for winding up the Company by the Court, and shall confer full Authority on the Court to make Calls, or to enforce Calls made by the Liquidators, and to exercise all other Powers which it might

have exercised of its own Motion, or on the Application of the official Liquidators, if an Order had been made for winding up the Company altogether by the Court.

V. Where an Order, Interlocutor, or Decree has been made in *Scotland* for winding up a Company compulsorily, or where an Order, Interlocutor, or Decree has been made in pursuance of the said Nineteenth Section for the Continuance of a voluntary Winding-up, it shall be competent to the Court in *Scotland* during Session, and to the Lord Ordinary on the Bills during Vacation, on Production by the Liquidators of a List certified by them of the Names of the Contributories liable in Payment of any Calls which they may wish to enforce, and of the Amount due by each Contributory respectively, and of the Date when the same became due, to pronounce forthwith a Decree against such Contributories for Payment of the Sums so certified to be due by each of them respectively, with Interest from the said Date till Payment at the Rate of Five Pounds *per Centum per Annum*, in the same Way and to the same Effect as if they had severally consented to Registration for Execution, on a Charge of Six Days, of a legal Obligation to pay such Calls and Interest; and such Decree may be extracted immediately, and no Suspension thereof shall be competent, except on Caution or Consignation, unless with special Leave of the Court or Lord Ordinary.

VI. Where an Order has been made for winding up a Company compulsorily, or where an Order has been made in pursuance of the said Nineteenth Section, for the Continuance of a voluntary Winding-up, no Suit, Action, or other legal Proceeding shall be proceeded with or commenced against the Company or the Public Officer thereof, or any Member of the Company in respect of a Debt of the Company, except with the Leave of the Court, and subject to such Terms as the Court may impose.

VII. Where an Order has been made for winding up a Company compulsorily, or where an Order has been made, in pursuance of the said Nineteenth Section, for the Continuance of a voluntary Winding-up, the Court may make such Order as it thinks just as to the Inspection by the Creditors and Contributories of Books and Papers of the Company, and such Books and Papers may be inspected by Creditors or Contributories, in conformity with such Order of the Court, but not further or otherwise.

VIII. Where an Order has been made in pursuance of the said Nineteenth Section for the Continuance of a voluntary Winding-up, and such Order is afterwards superseded by an Order directing the Company to be wound up compulsorily, the Court may in such last-mentioned Order, or

In compulsory Winding-up, or Continuance of voluntary Winding-up, by Decree or Order, Contributories may be decreed to pay Calls.

Actions and Suits to be stayed.

Inspection of Books.

Appointment of voluntary Liquidators as official Liquidators.

in any subsequent Order, appoint the voluntary Liquidators or any of them, either provisionally or permanently, and either with or without the Addition of any other Persons, to be official Liquidators.

Power of Court to give Discretion to official Liquidators.

IX. Where the Court makes an Order for winding up a Company compulsorily, it may, if it thinks fit, provide by that or any subsequent Order that the official Liquidators may exercise any specified Powers without the Intervention of the Court.

General Scheme of Liquidation may be sanctioned by Court.

X. Where an Order has been made for winding up a Company compulsorily, or where an Order has been made, in pursuance of the said Nineteenth Section, for the Continuance of a voluntary Winding-up, the Liquidators may, with the sanction of the Court, and upon such Notice to Creditors as to the Court shall seem fit, at any Stage of the Winding-up, pay any Classes of Creditors in full, or make such other Arrangement with Creditors as the Court may sanction; and any general or partial Scheme of Liquidation, if approved of by the Court, shall be binding on all the Creditors and Contributories of the Company.

Reservation of Practice under old Winding-up Acts.

XI. The Practice hitherto in use in the Court of Chancery in *England* in winding up Companies, under "The Joint Stock Companies Winding-up Act, 1848," and "The Joint Stock Companies Winding-up Act, 1849," including the Service of Summonses, Notices, and other Documents by Post, and including the Payment of a Per-centage in lieu of Fees to the Suitors Fee Fund, the Non-entry of Orders at the Registry Office, and all Powers and Jurisdictions given to the said Court of Chancery by the said Acts, and not conferred by the Joint Stock Companies Acts, shall be applicable to the winding up under the said Joint Stock Companies Acts of Companies by the Court of Chancery and Courts of Bankruptcy in *England*, until Rules for regulating such Winding-up are made in pursuance of the Powers for that Purpose given by the said Joint Stock Companies Acts; and the Courts of Chancery and Courts of Bankruptcy in *England* may adopt such Practice, Powers, and Jurisdictions to the same Extent as if the Companies were being wound up under "The Joint Stock Companies Winding-up Act, 1848," and "The Joint Stock Companies Winding-up Act, 1849;" and in the Case of Companies engaged in working any Mines within and subject to the Jurisdiction of the Stannaries, and registered under the Joint Stock Companies Acts, 1856, 1857, the like Practice, Powers, and Jurisdiction may, by Rules to be made under the Ninety-eighth Section of "The Joint Stock Companies Act, 1856," be adopted and exercised by the Court of the Vice-Warden of the Stannaries, so far as such

Practice, Powers, and Jurisdiction are or can be made applicable to that Court.

XII. Any Order made by the Court in *England* for or Order made in *England* in the Course of the Winding-up of a Company under the Joint Stock Companies Acts shall be enforced in *Scotland* to be enforced in *Scotland* and *Ireland* in the Courts that would respectively have had Jurisdiction in respect of such Company if the registered Office of the Company had been established in *Scotland* or *Ireland*, and in the same Manner in all respects as if such Order had been made by the Courts that are hereby required to enforce the same; and in like Manner Orders, Interlocutors, and Decrees made by the Court in *Scotland* for or in the Course of the winding up of a Company shall be enforced in *England* and *Ireland*, and Orders made by the Court in *Ireland* for or in the Course of winding up a Company shall be enforced in *England* and *Scotland*, by the Courts which would respectively have had Jurisdiction in the Matter of such Company if the registered Office of the Company were established in the Division of the United Kingdom where the Order is required to be enforced, and in the same Manner in all respects as if such Order had been made by the Court required to enforce the same in the Case of a Company within its own Jurisdiction.

XIII. Where any Order, Interlocutor, or Decree made by one Court is required to be enforced by another Court, as herein-before provided, an Office Copy of the Order, Interlocutor, or Decree so made shall be produced to the proper Officer of the Court required to enforce the same, and the Production of such Office Copy shall be sufficient Evidence of such Order, Interlocutor, or Decree having been made, and thereupon such last-mentioned Court shall cause such Order, Interlocutor, or Decree to be registered, or shall take such other Steps in the Matter as may be requisite for enforcing such Order, Interlocutor, or Decree, in the same Manner as if it were the Order, Interlocutor, or Decree of the Court enforcing the same.

XIV. Where a Company is being wound up altogether voluntarily, the Liquidators may apply to the Court, or to the Lord Ordinary on the Bills in *Scotland* in Time of voluntary Vacation, by Petition, Motion, the Presentation of a Special Case, or in such other Manner as the Court may direct, to determine any Question arising in the Matter of such Winding-up, or to exercise, as respects the enforcing any Calls, or in respect of any other particular Matter, all or any of the Powers which the Court might exercise if the Company were being wound up compulsorily; and the Court, or Lord Ordinary in the Case aforesaid, if satisfied that the Determination of such Question or the required Exercise of Power

will be just and beneficial, may accede, wholly or partially, to such Application, upon such Terms and subject to such Conditions as the Court thinks fit, or it may make such other Order, Interlocutor, or Decree on such Application as the Court thinks just.

Power of
Company
to fill up
Vacancies
in Liquidators.

XV. Where any Company is being wound up altogether voluntarily, or is being wound up subject to the Provisions of the said Nineteenth Section, the Company in General Meeting may fill up any Vacancy occasioned by the Death or Resignation of any Liquidator or Liquidators appointed by the Company.

Power for
Liquidators
to invest.

XVI. In case of any Company being wound up compulsorily, the Liquidators may invest any Moneys for the Time being in their Hands, or standing to their Credit in the Bank of *England*, arising from such Winding-up in Government Securities, including Exchequer Bills.

Manner of
making a
Call.

XVII. In fixing the Amount payable by any Contributory, in pursuance of the Joint Stock Companies Acts or any of them, he shall be debited with the Amount of all Debts due from him to the Company, including the Amount of the Call, and shall be credited with all Sums due to him from the Company on any independent Contract or Dealing between him and the Company, and the Balance, after making such Debit and Credit as aforesaid, shall be deemed to be the Sum due.

Calls
proveable
against
Bankrupts
or Insolvents'
Estates.

XVIII. All Calls made or to be made on any Shareholder or Contributory, in pursuance of any of the Joint Stock Companies Acts, shall, in the event of such Shareholder or Contributory becoming bankrupt or insolvent, be proveable against his Estate.

Section 16.
of 20 & 21
Vict. c. 14.
repealed,
and this
Section
to be substituted.

XIX. The Sixteenth Section of "The Joint Stock Companies Act, 1857," shall be repealed; and in lieu thereof be it enacted as follows: The Liquidators shall have Power to compromise all Calls and Liabilities to Calls, Debts, and Liabilities capable of resulting in Debts, and all Claims, whether present or future, certain or contingent, ascertained, or sounding only in Damages, subsisting or supposed to subsist between the Company and any Contributory or alleged Contributory, or other Debtor or Person apprehending Liability to the Company, upon the Receipt of such Sums, payable at such Times, and generally upon such Terms as may be agreed upon, with Power for the Liquidators to take any Security for the Discharge of such Debts or Liabilities, and to give complete Discharges in respect of all or any such Calls, Debts, or Liabilities; subject to the Proviso, that where an Order has been made by the Court for winding up a Company compulsorily, or where an Order has been made, in pursuance of the said Nineteenth

action, for the Continuance of a voluntary Winding-up, such Compromise shall be made, except in accordance with the Directions of the Court, as expressed generally in any Order made by the Court, or as given in each particular Case, and after giving such Notice to Creditors, or any Portion of them, as the Court shall direct; and that where a Company is being wound up altogether voluntarily no such Compromise shall be effected, except with the Sanction of a Special Resolution of the Company, or of general or particular Power delegated to the Liquidators by a special Resolution.

XX. Where any Order is made for winding up a Company compulsorily, or for the Continuance of a voluntary Winding-up, subject to the Provisions of the said Ninth Section, if it appear in the Course of such Winding-up that any past or existing Director, Manager, Public Officer, or Member of such Company has been guilty of any Offence in relation to the Company for which he is criminally responsible, the Court may, on the Application of any Person interested in such Winding-up, or of its own Motion, direct the official Liquidators, or the Liquidators as the Case may be), to institute and conduct a Prosecution or Prosecutions for such Offence, and to Order the Costs and Expenses to be paid out of the Assets of the Company.

XXI. Where a Company is being wound up altogether voluntarily, if it appear to the Liquidators conducting such Winding-up that any past or existing Director, Manager, Public Officer, or Member of such Company has been guilty of any Offence in relation to the Company for which he is criminally responsible, it shall be lawful for the Liquidators, with the previous Sanction of the Court, to prosecute such Offender, and all Expenses properly incurred by them in such Prosecution shall be payable out of the Assets of the Company in Priority to all other Liabilities.

XXII. This Act shall apply in Cases where an Order has been already made for winding up a Company compulsorily, or where an Order has been made, in pursuance of the Nineteenth Section, for the Continuance of a voluntary Winding-up, or where a Company is in the Course of being wound up altogether voluntarily.

XXIII. Any Company or Copartnership, consisting of seven or more Persons, having by its Constitution a Capital of fixed Amount, divided into Shares, also of fixed Amount, if it legally carried on the Business of Banking previously to "The Banking Companies Act, 1857," is entitled to register itself or to continue registered under "The Joint Stock Banking Companies Act, 1857," for the Purpose of winding up under that Act, and if it legally carried

on any other Business than Banking, except that of Insurance, previously to the passing of "The Joint Stock Companies Act, 1856," is entitled to register itself or to continue registered under "The Joint Stock Companies Act, 1856," or the Joint Stock Companies Acts, 1856, 1857, for the Purpose of winding up under those Acts.

Applica-
tion of
Act to
other Acts.

XXIV. This Act shall extend to the Provisions of the Joint Stock Companies Acts, 1856, 1857, incorporated with "The Joint Stock Banking Companies Act, 1857."

CAP. LXV.

An Act to amend an Act of the last Session, to render more effectual the Police in Counties and Burghs in Scotland.
—[2d August 1858.]

20 & 21
Vict. c. 72.

WHEREAS by the Eighth Section of an Act passed in the last Session of Parliament, intituled *An Act to render more effectual the Police in Counties and Burghs in Scotland*, it is enacted, that it shall be lawful for the Sheriff of any County within whose Jurisdiction the Works of any Railway, Canal, or other public Work of a similar Nature shall be in progress of Construction, upon the Application of the Company or other Parties carrying on any such public Work, or for any Two Justices of the Peace of such County usually acting in the District in or through which any such public Work may be in the Course of Construction, on similar Application, to give Directions for the Purpose of keeping the Peace: And whereas it is expedient that Justices of the Peace should be authorized to make such Application to the Sheriffs of Counties, and that the power of giving Directions should be confined to such Sheriffs: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Section 8
of recited
Act re-
pealed.
Power to
appoint
additional
Constables
to keep
the Peace
on public
Works.

I. The Eighth Section of the said recited Act is hereby repealed.

II. It shall be lawful for the Sheriff of any County within whose Jurisdiction the Works of any Railway, Canal, or other public Work of a similar Nature shall be in Progress of Construction, upon the Application of the Company or other Parties carrying on any such public Work, or of any Two Justices of the Peace of such County

usually acting in the District in or through which any such Public Work may be in the Course of Construction, to direct from Time to Time the Chief Constable of such County to appoint such additional Number of Constables as such Sheriff may think fit for the special Purpose of keeping the Peace, and for the Security of Persons and Property against Crimes and unlawful Acts, within the Limits of such public Works and within a Mile therefrom, and such Constables so appointed shall be specially charged with such Duties, and shall have all the Powers, Privileges, and Duties of other Constables appointed under the said recited Act; and such Sheriff shall decern the Company or other Parties carrying on such public Works to make Payment to the Clerk of Supply of the County of the Wages and Allowances of such Constables so appointed, at such Rate and at such Time and in such Manner as the Sheriff shall appoint: Provided always, that the Rate so paid shall not exceed the highest Rate paid for the Time by any other Constable of the County; and where the Company or other Parties carrying on any public Work shall refuse or neglect, within Fourteen Days next after the Demand thereof, to pay any such Wages and Allowances in any Part thereof as shall by such Sheriff have been directed to be paid, it shall be lawful for such Sheriff forthwith to cause the same to be levied, together with the Expense of levying the same, by Pounding and Sale of the Goods and Effects of the Company or other Parties liable to pay such Wages and Allowances.

III. The said recited Act and this Act shall be read and construed as One Act.

Recited
Act and
this Act
to be as
One.

CAP. LXX.

An Act to amend the Act of the Fifth and Sixth Years of Her present Majesty, to consolidate and amend the Laws relating to the Copyright of Designs for ornamenting Articles of Manufacture.—[2d August 1858.]

WHEREAS by an Act passed in the Fifth and Sixth Years of the Reign of Her present Majesty, intituled *An Act to consolidate and amend the Laws relating to the Copyright of Designs for ornamenting Articles of Manufacture*, hereinafter called "The Copyright of Designs Act, 1842," there was granted to the Proprietor of any new and original Design in respect of the Application of any such Design to ornamenting any Article of Manufacture contained in the

Tenth Class therein mentioned, with the Exceptions therein mentioned, the sole Right to apply the same to any Articles of Manufacture, or any such Substances as therein mentioned, for the Term of Nine Calendar Months, to be computed from the Time of such Design being registered according to the said Act: And whereas it is expedient that the term of Copyright, in respect of the Application of Designs to the ornamenting of Articles of Manufacture comprised in the said Tenth Class, should be extended, and that some of the Provisions of the said Act should be altered, and that further Provision should be made for the Prevention of Piracy, and for the Protection of Copyright in Designs under the Acts in the Schedule hereto annexed, and herein-after called "The Copyright of Designs Act." Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows; that is to say,

Short Title. I. In citing this Act for any Purpose whatsoever, it shall be sufficient to use the Expression "The Copyright of Designs Act, 1858."

Copyright of Designs Acts and this Act to be as One. II. The said Copyright of Designs Acts and this Act shall be construed together as One Act.

Extension of Term of Copyright as to the Tenth Class mentioned in 5 & 6 Vict. c. 100. III. In respect of the Application of any new and original Design for ornamenting any Article of Manufacture contained in the Tenth Class mentioned in "The Copyright of Designs Act, 1842," the Term of Copyright shall be Three Years, to be computed from the Time of such Design being registered, in pursuance of the Provisions of "The Copyright of Designs Acts," and of this Act: Provided nevertheless, that the Term of such Copyright shall expire on the Thirty-first of *December* in the Second Year after the Year in which such Design was registered, whatever may be the Day of such Registration.

Copyright not to be prejudiced if Articles marked. IV. Nothing in the Fourth Section of "The Copyright of Designs Act, 1842," shall extend or be construed to extend to deprive the Proprietor of any new and original Design applied to ornamenting any Article of Manufacture contained in the said Tenth Class of the Benefits of "The Copyright of Designs Acts," or of this Act: Provided there shall have been printed on such Articles at each End of the original Piece thereof the Name and Address of such Proprietor, and the Word "Registered," together with the Years for which such Design was registered.

Pattern may be registered. V. And be it declared, That the Registration of any Pattern or Portion of an Article of Manufacture to which a Design is applied, instead or in lieu of a Copy, Drawing,

Print, Specification, or Description in Writing, shall be as valid and effectual to all Intents and Purposes as if such Copy, Drawing, Print, Specification, or Description in Writing had been furnished to the Registrar under "The Copyright of Designs Acts."

VI. The Proprietor of such extended Copyright shall, on Application by or on behalf of any Person producing or vending any Article of Manufacture so marked, give the Number and the Date of the Registration of any Article of Manufacture so marked; and any Proprietor so applied to who shall not give the Number and Date of such Registration shall be subject to a Penalty of Ten Pounds, to be recovered by the Applicant, with full Costs of Suit, in any Court of competent Jurisdiction.

Proprietor to give the Number and Date of Registration.

VII. Any Person who shall wilfully apply any Mark of Registration to any Article of Manufacture in respect whereof the Application of the Design thereto shall not have been registered, or after the Term of Copyright shall have expired, or who shall, during the Term of Copyright, without the Authority of the Proprietor of any registered Design, wilfully apply the Mark printed on the Piece of any Article of Manufacture, or who shall knowingly sell or issue any Article of Manufacture to which such Mark has been wilfully and without due Authority applied, shall be subject to a Penalty of Ten Pounds, to be recovered by the Proprietor of such Design, with full Costs of Suit, in any Court of competent Jurisdiction.

Penalty on issuing Articles not so marked.

VIII. Notwithstanding anything in "The Copyright of Designs Acts," it shall be lawful for the Proprietor of Copyright in any Design under "The Copyright of Designs Acts," or this Act, to institute Proceedings in the County Court of the District within which the Piracy is alleged to have been committed, for the Recovery of Damages which he may have sustained by reason of such Piracy: Provided always, that in any such Proceedings the Plaintiff shall deliver with his Plaint a Statement of Particulars as to the Date and Title or other Description of the Registration whereof the Copyright is alleged to be pirated, and as to the alleged Piracy; and the Defendant, if he intends at the Trial to rely as a Defence on any Objection to such Copyright, or to the Title of the Proprietor therein, shall give Notice in the Manner provided in the Seventy-sixth Section of the Act of the Ninth and Tenth *Victoria*, Chapter Ninety-five, of his Intention to rely on such special Defence, and shall state in such Notice the Date of Publication and other Particulars of any Designs whereof prior Publication is alleged, or of any Objection to such Copyright, or to the Title of the Proprietor to such Copyright; and it shall be

Proceedings for Prevention of Piracy may be instituted in the County Courts.

lawful for the Judge of the County Court, at the Instance of the Defendant or Plaintiff respectively, to require any Statement or Notice so delivered by the Plaintiff or of the Defendant respectively to be amended in such Manner as the said Judge may think fit.

The Pro-
ceedings of
County
Courts
Acts appli-
cable to
proceed-
ings for
Piracy of
Designs.

LX. The Provisions of an Act of the Ninth and Tenth *Victoria*, Chapter Ninety-five, and of the Twelfth and Thirteenth *Victoria*, Chapter One hundred, as to Proceedings in any Plaint, and as to Appeal, and as to Writs of Prohibition, shall, so far as they are not inconsistent with or repugnant to the Provisions of this Act, be applicable to any Proceedings for Piracy of Copyright of Designs under the said Copyright of Designs Acts or this Act.

SCHEDULE referred to in the foregoing Act.

5 & 6 Vict. c. 100.
[10 Aug. 1842.]

An Act to consolidate and amend the Laws relating to the Copyright of Designs for ornamenting Articles of Manufacture.

6 & 7 Vict. c. 65.
[22 Aug. 1843.]

An Act to amend the Laws relating to the Copyright of Designs.

13 & 14 Vict. c. 104.
[14 Aug. 1850.]

An Act to extend and amend the Acts relating to the Copyright of Designs.

14 Vict. c. 8.
[11 April 1851.]

An Act to extend the Provisions of the Designs Act, 1850, and to give Protection from Piracy to Persons exhibiting new Inventions in the Exhibition of the Works of Industry of all Nations in One Thousand eight hundred and fifty-one.

CAP. LXXV.

An Act to amend the Law relating to Cheap Trains, and to restrain the Exercise of certain Powers by Canal Companies being also Railway Companies.—[2d August 1858.]

7 & 8 Vict.
c. 85.

WHEREAS by the Act passed in the Session of Parliament held in the Seventh and Eighth Years of the Reign of Her present Majesty, Chapter Eighty-five, Section Six, it is enacted, amongst other things, with respect to the Cheap Trains thereby required to be provided in certain Cases, that the Fare or Charge for each Third-Class Passenger by any such Train shall not exceed One Penny for each Mile travelled: And whereas it is expedient to amend the said

Act in manner herein-after mentioned: And whereas it is also expedient to amend the Act passed in the Ninth Year of the Reign of Her present Majesty, Chapter Forty-two, intituled *An Act to enable Canal Companies to become Carriers of Goods upon their Canals*, by restraining as herein-after mentioned the Exercise of certain Powers therein contained: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. When the Distance travelled by any Third-class Passenger by any Train run in compliance with the Provisions relating to Cheap Trains contained in the said Act of the Seventh and Eighth of *Victoria*, Chapter Eighty-five, is a Portion of a Mile, and does not amount to One Mile, the Fare for such Portion of a Mile may be One Penny, or when such Distance amounts to one Mile, or Two or more Miles, and a Portion of another Mile, the Fare or Charge for such Portion of a Mile, if the same amounts to or exceeds One Half-Mile, may be One Halfpenny: Provided always, that for Children of Three Years and upwards, but under Twelve Years of Age, the Fare or Charge shall not exceed Half the Charge for an adult Passenger.

II. After the passing of this Act, no Fare heretofore charged to or received from any Third-class Passenger by any such Train as aforesaid shall in any Proceeding to be hereafter instituted be deemed to have exceeded the Rate prescribed in such Case by the said Act of the Seventh and Eighth of *Victoria*, Chapter Eighty-five, if the same shall not have exceeded the Rate of One Farthing for each entire Quarter of a Mile travelled.

III. Notwithstanding anything contained in the said recited Act of the Ninth Year of Her Majesty, it shall not be lawful for any Canal or Navigation Company, being also a Railway Company, or entitled to work any Railway constructed under the Authority of any Act of Parliament, hereafter to accept a Lease of the whole or any Part of the Undertaking of any other Railway and Canal Company or of any Canal or Navigation Company, or of the Tolls, Dues, or Charges upon or in respect of the whole or any Part of any such Undertaking, except under the Powers of some Act or Acts heretofore passed or to be hereafter passed in which the parties to any such Lease shall be specifically named and authorised to enter into the same.

IV. This Act shall continue in force for One Year next after the passing thereof, and thence to the End of the then next Session of Parliament.

CAP. LXXVI.

An Act to simplify the Forms and diminish the Expense of completing Titles to Land in Scotland.—[2d August 1858.]

WHEREAS it is expedient to simplify the Forms and diminish the Expense of completing Titles to Land in Scotland: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

Instru-
ments of
Sasine no
longer ne-
cessary,
but Con-
veyances
may be
recorded
instead.

I. From and after the First Day of *October* in the present Year, it shall not be necessary to expedite and record an Instrument of Sasine on any Conveyance of Lands, but it shall be competent and sufficient for the Person or Persons in whose Favour the Conveyance is granted, instead of expediting and recording such Instrument of Sasine, to record the Conveyance itself in the Register of Sasines applicable to the Lands therein contained; and the Conveyance, being presented for Registration with a Warrant of Registration thereon, in or as nearly as may be in the Form of Schedule (A.) No. 1. hereto annexed, specifying the Person or Persons on whose Behalf it is so presented, and signed by such Person or Persons, or his or their Agent, and being so recorded along with such Warrant, shall have the same legal Force and Effect in all respects as if the Conveyance so recorded had been followed by an Instrument of Sasine duly expedite and recorded at the Date of recording the said Conveyance, according to the present Law and Practice, in favour of the Person or Persons on whose Behalf the Conveyance is presented for Registration.

Not neces-
sary to
record the
whole Con-
veyance.

II. Where a Conveyance of Lands shall be contained in a Deed granted for further Purposes and Objects, such as a Marriage Contract, Deed of Trust, or Deed of Settlement, it shall not be necessary to record the whole of such Deed, but it shall be competent and sufficient to expedite and record in the appropriate Register of Sasines a Notarial Instrument setting forth generally the Nature of the Deed and containing at length those Portions of the Deed by which the Lands are conveyed, and by which Real Burdens, Conditions, or Limitations are imposed; and where a Deed conveys separate Lands or separate Interests in the same Lands to the same or different Persons, it shall not be necessary to record the whole of such Deed, but it shall be competent and sufficient to expedite and record as

foresaid a Notarial Instrument setting forth generally the Nature of the Deed, and containing at length the Part or Parts of the Deed by which particular Lands are conveyed to the Person or Persons in whose Favour the Notarial Instrument is expedite, and the Part of the Deed which specifies the Nature and Extent of the Right and Interest of such Person or Persons, with the Real Burdens, Conditions, and Limitations, if any, and such Notarial Instrument shall be in or as nearly as may be in the Form of Schedule (B.) hereto annexed.

III. Immediately before the Testing Clause of any Conveyance it shall be competent to insert a Clause of Direction, in or as nearly as may be in the Form of Schedule (C.) hereto annexed, specifying the Part or Parts of the Conveyance which the Granter thereof desires to be recorded in the Register of Sasines, and when such Clause is so inserted the Keeper of the Register shall record such Part or Parts only, together with the Clause of Direction and the Testing Clause, and the recording of such Part or Parts of the Conveyance, together with the Clause of Direction and the Testing Clause, and the Warrant of Registration as before provided, shall have the same legal Force and Effect as if a Notarial Instrument containing such Part or Parts of the Conveyance had been duly expedite and recorded in favour of the Party on whose Behalf the Conveyance is presented: Provided always, that, notwithstanding such Clause of Direction, it shall be competent for the Party entitled to present the Conveyance for Registration to record the whole Conveyance, or to expedite and record a Notarial Instrument as herein-before provided, in the same Manner as if the Conveyance had contained no such Clause of Direction; and where a Notarial Instrument shall be expedite as herein-before provided, no Part or Parts of the Conveyance directed to be recorded shall be omitted from such Instrument.

IV. It shall not be necessary to expedite and record an Instrument of Resignation *ad remanentiam* on any Procuratory of Resignation *ad remanentiam*, or on any Conveyance containing an express Clause of Resignation *ad remanentiam*, but it shall be competent and sufficient for the Superior in whose Favour the Resignation under such Procuratory or Conveyance is authorised to be made to record in the appropriate Register of Sasines such Procuratory or Conveyance, with a Warrant of Registration thereon, or to expedite and record a Notarial Instrument, as nearly as may be in the Form of Schedule (B.); and such Procuratory or Conveyance and Warrant, or such Notarial Instrument, being so recorded, shall have the same Effect as if an Instrument of Resignation *ad remanentiam* had been expedite

Clause directing Part of Conveyance to be recorded.

Instruments of Resignation *ad remanentiam* no longer necessary, but Conveyances in favour of Superior may be recorded instead.

on such Procuratory or Conveyance, and had been recorded in the Register of Sasines, according to the present Law and Practice at the Date of recording such Procuratory or Conveyance or Instrument; and all Instruments of Resignation *ad remanentiam* may be in or as nearly as may be in the Form of Schedule (D.), and when in such Form may be recorded in the appropriate Register of Sasines at any Time during the Life of the Party in whose Favour the Resignation is made, and the Date of Presentment and Entry set forth on any Instrument of Resignation in such Form by the Keeper of the Register shall be the Date of the Resignation and of the Instrument.

Certain
Clauses no
longer ne-
cessary in
Convey-
ances.

V. It shall not be necessary to insert in any Conveyance a Clause of Obligation to infeft, or a Precept of Sasine or Warrant for infeftment; and if the Lands shall be disposed to be holden *a me* only or *a me vel de me*, the Clause so expressing the Manner of holding shall imply that the Lands are to be holden in the Manner expressed in the Act Tenth and Eleventh *Victoria*, Chapter Forty-eight, Section Two, with reference to Obligations to infeft *a me* or *a me vel de me* respectively; and where no holding is expressed the Conveyance shall be held to imply that the Lands are to be holden in the same Manner in which the Grantor of the Conveyance held or might have held the same; and a Clause of Resignation in any Conveyance shall be held to import a Resignation *in favorem* only, unless specially expressed to be a Resignation *ad remanentiam*: Provided always, that nothing herein contained shall prevent an Instrument of Resignation *ad remanentiam* being expressed and recorded on a Conveyance heretofore granted, and containing a Clause of Resignation in the Form authorised by the Act of the Tenth and Eleventh *Victoria*, Chapter Forty-eight.

Provision
where
Lands are
held of the
Crown,
&c. and a
Confirma-
tion of a
Deed, &c.
required.

VI. Where Lands are held of the Crown or Prince and Steward of *Scotland*, and a Confirmation of any Deed or Instrument of Sasine or Notarial Instrument recorded in the appropriate Register of Sasines shall be required, it shall be competent to apply to the Presenter of Signatures for a Writ of Confirmation to be written on such Deed or Instrument, instead of a Charter of Confirmation, and such Application shall be made in the same Manner in all respects as when a Charter of Confirmation is now applied for; and on the Presenter of Signatures being satisfied that the Party applying would be entitled to a Charter of Confirmation, he shall direct a Writ of Confirmation in, or as nearly as may be in, the Form of Schedule (E.) to be written on such Deed or Instrument; and such Writ of Confirmation shall be signed by the Presenter of Signatures.

and the Amount of the Fees exigible in the Office of the Presenter of Signatures, and also of the Duties and Casualties payable in Exchequer on account of the Lands contained in the Deed or Instrument confirmed, shall be marked on the Deed or Instrument confirmed, and certified by the Signatures of the Auditor of Exchequer and of the Presenter of Signatures; and on Payment of such Fees, Duties, and Casualties being made, the Deed or Instrument so confirmed shall be officially transmitted to the Director of Chancery, who, or his Deputy or Substitute, shall enter or cause to be entered in a Book to be kept for the Purpose, and intituled "The Register of Confirmations and Resignations," the leading Name or Names or other short distinctive Description of the Lands comprehended in the Deed or Instrument confirmed, the Date of recording such Deed or Instrument, the Register in which the same is recorded, the Name of the Party in whose Favour the Writ of Confirmation is granted, the Date of the Confirmation, and also the Name of the last entered Vassal, and the Date of his Entry, and the Deed or Instrument so confirmed shall thereafter be delivered to the Party applying for Confirmation, or his Agent; and the Confirmation so granted shall in all respects be as effectual as a Charter of Confirmation according to the present Law and Practice, and shall be held to confirm the whole prior Deeds and Instruments necessary to be confirmed, in order to complete the Investiture of the Party obtaining the Confirmation.

VII. Where Lands are held of a Subject Superior, and a Provision for Confirmation of any Deed or Instrument of Sasine or Notarial Instrument recorded as aforesaid shall be required, when Lands are held of a Subject Superior, and a Confirmation of a Deed, &c. required. shall be competent for the Superior to confirm such Deed or Instrument by a Writ of Confirmation to be written upon such Deed or Instrument as nearly as may be in the form of Schedule (E.), and the Confirmation so granted shall be to all Intents and Purposes as effectual as a Charter of Confirmation according to the present Law and Practice, and the Superior shall be bound so to confirm such Deed or Instrument, if required so to do: Provided always, that the Party requiring such Confirmation shall be entitled to demand an Entry by Confirmation, and shall, if required, produce to the Superior a Charter or other Writ showing the Tenendas and Reddendo of the Lands contained in such Deed or Instrument, and shall also at the same Time pay or tender to the Superior such Duties or Casualties as he may be entitled to demand; and the Confirmation so granted shall be held to confirm the whole prior Deeds and Instruments necessary to be confirmed in order to complete the Investiture of the Party obtaining the Confirmation.

Provision
where
Lands are
held of
the Crown,
&c. and a
new Investiture by
Registration,
&c. required.

VIII. Where Lands are held of the Crown, or Prince and Steward of *Scotland*, and a new Investiture by Resignation shall be required, it shall be competent for the Party in right of the Deed which is the Warrant for Resignation to apply to the Presenter of Signatures for a Writ of Resignation, to be written on such Deed, instead of a Charter of Resignation; and the Application shall be made in the same Manner in all respects as when a Charter of Resignation is now applied for; and on the Presenter of Signature being satisfied that the Party applying would be entitled to a Charter of Resignation, he shall direct a Writ of Resignation, in or as nearly as may be in the Form of Schedule (F.), to be written on the Deed which is the Warrant for Resignation; and the Writ of Resignation shall be signed by the Presenter of Signatures, and the Amount of the Fees exigible in the Office of the Presenter of Signatures, and also of the Duties and Casualties payable in Exchequer on account of the Lands resigned, shall be marked on the Deed, and certified by the Signatures of the Auditor of Exchequer and of the Presenter of Signatures; and on Payment of such Fees, Duties, and Casualties being made, the Deed shall be officially transmitted to the Director of Chancery, who, or his Deputy or Substitute, shall enter or cause to be entered in "The Register of Confirmations and Resignations," the leading Name or Names or other short distinctive Description of the Lands resigned, the Name of the Party in whose Favour the Writ is granted, the Date of the Writ, and also the Name of the last entered Vassal, and the Date of his Entry; and the Deed shall thereafter be delivered to the Party applying for the same, or his Agent, and the Deed, with the Writ of Resignation so written upon it, shall in all respects be as effectual as if a Charter of Resignation of the Lands had been duly obtained according to the present Law and Practice, and shall, to all Intents and Purposes, operate as a Confirmation of the whole prior Deeds and Instruments necessary to be confirmed in order to complete the Investiture of the Party obtaining such Writ; and it shall be competent to record in the appropriate Register of Sasines the Deed, with the Writ of Resignation written thereon, and Warrant of Registration also written thereon, and the recording of the same shall have the same legal Force and Effect in all respects as if a Charter of Resignation had been granted, and such Charter had been followed by an Instrument of Sasine duly expedite and recorded at the Date of recording such Deed and Writ, according to the present Law and Practice, in favour of the Party on whose Behalf the Deed and Writ are presented for Registration: Provided always, that the

recording of such Deed along with such Writ shall not have the Effect of an Instrument of Sasine following on such Deed.

IX. Where Lands are held of a Subject Superior, and a Provision new Investiture by Resignation shall be required, it shall ^{when} be competent for the Superior to grant in favour of the ^{Lands are held of a} Party in right of the Deed which is the Warrant for Resig- ^{Subject Superior, and a new Investiture by Resignation, &c.} nation a Writ of Resignation as nearly as may be in the Form of Schedule (F.), which shall be written on such Deed, and the Deed with the Writ of Resignation written thereon shall be to all Intents and Purposes as effectual as ^{required.} if a Charter of Resignation had been granted in the usual Form, according to the present Law and Practice, and the Superior shall be bound to grant such Writ of Resignation instead of a Charter of Resignation, if required so to do : Provided always, that the Party requiring such Writ shall be entitled to demand an Entry by Resignation, and shall, if required, produce to the Superior a Charter or other Writ showing the Tenendas and Reddendo of the Lands resigned, and shall also at the same Time pay or tender to the Superior such Duties or Casualties as he may be entitled to demand ; and the Writ of Resignation shall to all Intents and Purposes operate as a Confirmation of the whole prior Deeds and Instruments necessary to be confirmed in order to complete the Investiture of the Party obtaining the Writ ; and it shall be competent to record in the appropriate Register of Sasines the Deed with the Writ of Resignation written thereon, and Warrant of Registration also written thereon, and the recording of the same shall have the same legal Force and Effect in all respects as if a Charter of Resignation had been granted, and such Charter had been followed by an Instrument of Sasine duly expedited and recorded at the Date of recording the said Deed and Writ, according to the present Law and Practice, in favour of the Party on whose Behalf the Deed and Writ are presented for Registration : Provided always, that the recording of such Deed along with such Writ shall have the Effect of an Instrument of Sasine following on such Deed.

X. In granting Charters of Confirmation or Resignation ^{As to Charters by Progress.} or other Charters by Progress it shall be competent and sufficient to refer to the Tenendas and Reddendo of the Lands therein contained, as set forth at Length in any Charter or other Writ recorded in any Public Register, and Subject Superiors shall be bound, if required, to grant such Charters containing such Reference, in like Manner as they are now bound to grant similar Charters according to the Forms at present in use.

As to Writs
of Clare
constat.

XI. Where, according to the present Law and Practice, Precepts from Chancery or Precepts of Clare constat are in use to be granted, it shall be competent and sufficient to grant a Writ of Clare constat in or as nearly as may be in the Form of Schedule (G.), and to record such Writ of Clare constat with the Warrant of Registration thereon in the appropriate Register of Sasines, and the same being so recorded shall have the same legal Force and Effect in all respects as if a Precept from Chancery or Precept of Clare constat had been granted, and an Instrument of Sasine thereon had been duly expedite and recorded at the Date of recording the said Writ, according to the present Law and Practice, in favour of the Person or Persons on whose Behalf such Writ is presented for Registration; and Superiors shall be bound to grant such Writs of Clare constat, if required by the Heir entitled to demand the same: Provided always, that the Heir shall, if required, produce a Charter or other Writ showing the Tenendas and Reddendo of the Lands in which his Ancestor died vest, and shall also at the same Time pay or tender to the Superior such Duties or Casualties as he may be entitled to demand; and where the Lands are held of the Crown or of the Prince and Steward of *Scotland*, or where the Heir is required by the Superior, he shall also produce a Decree of General or of Special Service establishing his Right to succeed to the Lands; and where the Lands are held of the Crown or Prince and Steward of *Scotland*, the Application for such Writ of Clare constat shall be made in the same Manner in all respects as when a Precept from Chancery is now applied for; and such Writ of Clare constat shall be recorded in Chancery as Precepts are now in use to be recorded, and all Precepts from Chancery, Precepts and Writs of Clare constat, shall operate as a Confirmation of the whole Deeds and Instruments necessary to be confirmed in order to complete the Investiture of the Parties obtaining such Precepts or Writs.

As to Notarial Instruments in favour of General Disponees.

XII. Where a Party shall have granted or shall grant a General Conveyance of his Lands, whether by Deed *mortuaria causâ* or *inter vivos*, it shall be competent to the Disponent under such Conveyance, or to any other Party who shall have acquired Right to such Conveyance, in whole or in part, by Service, Assignment, Adjudication, or otherwise, to expedite and record a Notarial Instrument in or as nearly as may be in the Form of Schedule (H.); and on such Notarial Instrument being duly recorded in the appropriate Register of Sasines, such Disponent or such other Party acquiring Right as aforesaid shall be in all respects in the same position as if a Disposition had been executed by the

Grantor of the General Conveyance, in favour of the Party expeding the Notarial Instrument, of the Lands contained in such Notarial Instrument, with such Manner of holding, if any, as is expressed in the General Conveyance, and if no particular Manner of holding is therein expressed, then to be holden in the same Manner as the Grantor of the General Conveyance held or might have held the same, and as if such Disposition had been followed by an Instrument of Sasine of the said Lands in his Favour, duly exped and recorded at the Date of recording such Notarial Instrument, according to the present Law and Practice, except in the Case where the Subjects contained in such Notarial Instrument are Heritable Securities, in which Case the Party so expeding and recording the Instrument shall be in the same Position as if an Assignment of such Heritable Securities had been executed in his Favour by the Grantor of the General Conveyance, and as if such Assignment had been duly recorded in the appropriate Register of Sasines at the Date of recording such Notarial Instrument: Provided always, that where such Notarial Instrument shall be exped by a Party other than the original Disponent under such General Conveyance, the Notarial Instrument shall set forth the Title or Series of Titles by which the Party in whose Favour the Instrument is exped acquired Right to such Conveyance, and the Nature and Extent of his Right.

XIII. It shall be competent to any Party, in right of an unrecorded Conveyance, to assign the Conveyance in or as nearly as may be in the Form of Schedule (I.), No. 1, and the Assignment, or, in the event of there being more than One, the successive Assignations, may be recorded in the appropriate Register of Sasines along with the Conveyance itself, and a Warrant of Registration thereon, in or as nearly as may be in the Form of Schedule (A.), No. 2, and it shall be competent to write the Assignment or Assignations on the Conveyance itself in or as nearly as may be in the Form of Schedule (I.), No. 2; and the Conveyance, with such Warrant of Registration, along with the Assignment or Assignations, separate from or written upon the Conveyance, being so recorded, shall operate in favour of the Assignee on whose Behalf they are presented for Registration, as fully and effectually as if the Lands contained in the Assignment, or, if there be more than One, the last Assignment, had been disposed by the original Conveyance in favour of such Assignee, and the Conveyance, with the Warrant of Registration, had been recorded in the Manner herein-before provided of the Date of recording such Conveyance and Assignment or Assignations.

As to Notarial Instruments in favour of Parties acquiring Rights to unrecorded Conveyances.

XIV. Where any Party shall have acquired Right by General Conveyance, Service, Assignment, Adjudication, or otherwise, to an unrecorded Conveyance, granted in favour of another Person, it shall be competent to such Party to expedite a Notarial Instrument in or as nearly as may be in the Form of Schedule (K.), setting forth the Conveyance and the Title or Series of Titles by which he acquired Right to the same, and the Nature and Extent of his Right, and to record the Conveyance along with the Notarial Instrument in the appropriate Register of Sasines, or where it is not desired to record the whole of the Conveyance it shall be competent to expedite a Notarial Instrument in or as nearly as may be in the Form of Schedule (B.), setting forth generally the Nature of the Deed, and containing at Length those portions of the Deed by which the Lands in regard to which the said Instrument is expedite are conveyed, and by which Real Burdens, Conditions, or Limitations are imposed, and also setting forth the Title or Series of Titles by which the Party acquired Right to the Conveyance, and the Nature and Extent of his Right, and to record such Notarial Instrument in the appropriate Register of Sasines; and on the Conveyance, with a Warrant of Registration thereon, along with such Notarial Instrument in the Form of the said Schedule (K.), or on such Notarial Instrument in the Form of the said Schedule (B.) being so recorded, the Party expediting the Instrument shall be in the same Position as if the original Conveyance had been granted to himself, and along with a Warrant of Registration thereon had been recorded in the Manner hereinbefore provided of the Date of recording the Notarial Instrument.

Particular Description of Lands contained in prior recorded Deeds may be referred to, &c.

XV. Where Lands have been particularly described in any prior Conveyance, or other Writ, duly recorded in the appropriate Register of Sasines, it shall not be necessary, in any subsequent Conveyance or Writ containing or referring to the whole or any Part of such Lands, to repeat the particular Description of the Lands at Length, but it shall be sufficient to specify the leading Name or Names or other short distinctive Description of the Lands conveyed, and the Name of the County and Parish or supposed Parish, and to refer to the particular Description contained in the prior Conveyance or other Writ so recorded, in or as nearly as may be in the Manner set forth in Schedule (L.), No. 1; and the Specification and Reference so made shall be held to be equivalent to the full Insertion of the particular Description contained in such prior Conveyance or other Writ so recorded, and shall have the same Effect as if the particular Description had been inserted exactly as it is set

forth in such prior Conveyance or other Writ ; and in any other subsequent Conveyance or Writ it shall be competent and sufficient to use such leading Name or Names or short distinctive Description, with the Addition of the Name of the County and Parish or supposed Parish, and to make Reference to the Conveyance or Writ in which such leading Name or Names or short distinctive Description shall have been so specified, without again referring to the several Conveyances or other Writs containing the particular Description of such Lands ; and in such Case the Use of such leading Name or Names or short distinctive Description, with the Addition and Reference before provided, shall be held to be equivalent to the full Insertion of the particular Description contained in the several Conveyances or other Writs recorded and specified as aforesaid.

XVI. Where several Lands are comprehended in One Conveyance in favour of the same Person or Persons, it shall be competent to insert a Clause in the Conveyance declaring that the whole Lands conveyed, and therein particularly described, shall be designed and known in future by One general Name to be therein specified ; and on the Conveyance containing such Clause being duly recorded in the appropriate Register of Sasines, it shall be competent in all subsequent Conveyances or other Writs to use the general Name specified in such Clause as the Name of the several Lands declared by such Clause to be comprehended under it, and a Conveyance of such several Lands under the general Name so specified shall be as effectual in all respects as if the Conveyance contained a particular Description of each of such several Lands : Provided always, that Reference be made in such Conveyances and Instruments of Sasine and Notarial Instruments to a prior recorded Conveyance or Instrument of Sasine or Notarial Instrument or other Writ in which such Clause and Description are contained ; provided also, that it shall not be necessary in such Clause to comprehend under One general Name the whole Lands contained in the Conveyance in which such Clause is inserted, but that it shall be competent to comprehend certain Lands under one general Name, and certain other Lands under another general Name, it being clearly specified what Lands are comprehended under each general Name ; and such Clause of Reference shall be in or as nearly as may be in the Terms set forth in Schedule (L.), No. 2, hereto annexed.

XVII. Where Lands are or shall hereafter be held under a Deed of Entail it shall not be necessary to repeat the Destination contained in such Entail at Length in the Conveyances, Instruments of Sasine, Notarial Instruments,

Several Lands conveyed by the same Deed may be comprehended under One general Name.

Destinations in Entails may be referred to.

or other Writs necessary to transmit, renew, or complete a Title under such Entail, but it shall be sufficient to refer to the Destination as set forth at full Length in the Deed of Entail recorded in the Register of Tailzies, if the same shall have been so recorded, or as set forth at full Length in any Conveyance, Instrument of Sasine, Notarial Instrument, or other Writ duly recorded in the appropriate Register of Sasines forming Part of the Progress of Title Deeds of the Lands comprehended under the said Entail: such Reference being made in the Terms or as nearly as may be in the Terms set forth in Schedule (L.), No. 3. hereto annexed; and the Reference so made to such Destination shall be equivalent to the full Insertion thereof, and shall to all Intents and in all Questions whatever have the same legal Effect as if the Destination in the recorded Deed, Instrument, or other Writ referred to had been inserted at Length, notwithstanding any Law or Practice to the contrary, or any Injunction to the contrary contained in such Deed of Entail, and notwithstanding any Enactments or Provisions to the contrary contained in any Act or Acts of Parliament now in force, all which are hereby repealed, so far as inconsistent herewith, but no farther.

Certain
Clauses in
Entails no
longer ne-
cessary.

XVIII. Where a Deed of Entail contains an express Clause authorising Registration of the Deed in the Register of Tailzies it shall not be necessary to insert Clauses of Prohibition against Alienation, contracting Debt, and altering the Order of Succession, but such Clause of Registration shall have in every respect the same Operation and Effect as if such Clauses of Prohibition had been inserted according to the present Law and Practice, and duly fenced with irritant and resolute Clauses.

Recording
of Convey-
ances in the
Register
of Sasines
authorised.

XIX. All Conveyances and Procuratories of Resignation *ad remanentiam*, with Warrants of Registration written thereon, and all Notarial Instruments and Instruments of Resignation *ad remanentiam*, hereby authorised to be recorded in the Register of Sasines, may be recorded at any Time in the Life of the Party on whose Behalf the same shall be presented for Registration in the same Manner as Instruments of Sasine are recorded, and the Keepers of such Register are hereby authorised and required to record the same accordingly, when presented for that Purpose; and the Date of Entry in the Minute Book shall be held to be the Date of Registration, and the Date of Registration of all such Conveyances, Procuratories of Resignation *ad remanentiam*, Notarial Instruments, and Instruments of Resignation *ad remanentiam*, shall be equivalent to the Date of Registration of Instruments of Sasine and Instruments of Resignation *ad remanentiam* according to the existing Law

and Practice; and Extracts of all such Conveyances, Procuratories of Resignation, Warrants of Registration, Notarial Instruments, and Instruments of Resignation *ad remanentiam* so recorded shall make faith in all Cases in like Manner as the recorded Conveyances, Procuratories, Warrants, and Instruments themselves, except where any such Conveyance, Procuratory, Warrant, or Instrument so recorded shall be offered to be improven.

XX. Nothing contained in this Act shall prevent the Constitution, Transmission, or Completion of Land Rights by the Forms in use prior to the passing of this Act.

Present
Forms of
Convey-
ances may
be used.
Mode of
completing
Title by a
Judicial
Factor.

XXI. Where a Judicial Factor or other Judicial Manager shall apply by Petition for Authority to complete a Title to any Lands forming Part of the Estate under his Management, and where the Petition shall specify the Lands to which such Title is to be completed, the Warrant granted for completing such Title shall also specify the Lands to which such Title is to be completed, and such Warrant shall have the legal Operation and Effect of a Disposition of the Lands in favour of such Judicial Factor or Manager from the Party whose Estate is under Judicial Management, to be holden in the same Manner as such Party held or might have held the same, except in the Case where the Subjects contained in such Warrant shall be Heritable Securities, in which Case such Judicial Factor or Manager on recording such Warrant in the appropriate Register of Sasines shall be in the same Position as if such Party had granted in his Favour an Assignment of such Heritable Securities, and as if such Assignment had been recorded in the appropriate Register of Sasines at the Date of recording such Warrant.

XXII. It shall be competent to a Trustee on a sequestrated Estate, or to Liquidators, official or voluntary, appointed for the Purpose of winding up a Joint Stock Company, to expedite a Notarial Instrument, setting forth the Act and Warrant of Confirmation in favour of such Trustee, or the Appointment of such Liquidators, official or voluntary, respectively, and specifying the Lands belonging to the Bankrupt or Company to which a Title is to be completed, and the Title by which such Lands are held by the Bankrupt or Company, in or as nearly as may be in the Form of Schedule (M.) hereto annexed, and to record such Notarial Instrument in the appropriate Register of Sasines, and on such Notarial Instrument being so recorded such Trustee or such Liquidators shall be held to be in all respects in the same Position as if the Bankrupt or Company had granted a Conveyance of the Lands contained in the Notarial Instrument in favour of such Trustee or such

Mode of
completing
Title by a
Trustee
in Seque-
stration,
and by Li-
quidators
of Joint
Stock Com-
panies.

Liquidators, to be holden in the same Manner as the Bankrupt or the Company held or might have held the same, and as if such Conveyance had been followed by an Instrument of Sasine of said Lands in favour of such Trustee or of such Liquidators, duly expedite and recorded at the Date of recording such Notarial Instrument, except in the Case where the Subjects contained in such Notarial Instrument are Heritable Securities, in which Case such Trustee or such Liquidators, on recording the Instrument in the appropriate Register of Sasines, shall be in the same Position as if an Assignment of such Heritable Securities had been granted in favour of such Trustee by the Bankrupt, or in favour of such Liquidators by the Company, and as if such Assignment had been duly recorded in the appropriate Register of Sasines at the Date of recording such Notarial Instrument.

Mode of
relinquish-
ing Super-
iorities.

XXIII. In order to facilitate the extinguishing of Mid-superiorities not defeasible by the Vassal it shall be competent to any Subject Superior, whether himself entered with his Superior or not, to relinquish his Right of Superiority in favour of his immediate Vassal, by granting a Deed of Relinquishment in the Form and as nearly as may be in the Terms of Schedule (N, No. 1.) hereto annexed; and on the Deed of Relinquishment being accepted by the Vassal by an Acceptance written on such Deed in the Terms set forth in the Schedule (N, No. 2.) hereto annexed and being followed by a Writ of Investiture by the Over-superior as herein-after provided, also written upon the Deed of Relinquishment, and on such Deed with the Acceptance and Writ of Investiture written thereon being thereafter recorded in the appropriate Register of Sasines, the Superiority so relinquished shall be held to be extinguished, and the Vassal and his Successors in the Lands shall hold the same as immediate Vassals of the Over-superior by the Tenure and for the Reddendo by and for which such relinquished Superiority was held, and the Vassal and his foresaids shall be entitled to apply for an Entry to such Oversuperior accordingly as his immediate Superior; and such Relinquishment by a Superior who shall not have completed his Title to the Superiority relinquished shall not infer a passive Representation on his Part nor any Liability for the Debts of the Person last infert therein, beyond the Price or Consideration, if any, which he may receive for such Relinquishment.

Investiture
by Over-
superior.

XXIV. On the Application of the Vassal in the relinquished Superiority, and on Production by him of the Deed of Relinquishment, and Acceptance thereof, and on his paying or tendering such Duties and Casualties as may be

exigible by the Oversuperior, the Oversuperior shall be bound to receive the Vassal as his immediate Vassal by Writ of Investiture in or as nearly as may be in the Form of the Schedule (N, No. 3.) to be written on the Deed of Relinquishment, and the Tenendas and Reddendo contained in the Title Deeds of the relinquished Superiority shall be inserted therein in room of those contained in the former Investiture held under the relinquished Superiority; and where the Lands are held of the Crown or of the Prince and Steward of *Scotland* such Writ of Investiture shall be obtained from the Presenter of Signatures in the same Manner as is herein-before directed in regard to Confirmations written on the Deeds confirmed: Provided always, that the Party applying for such Writ of Investiture shall lodge or cause to be lodged in the Office of the Presenter of Signatures a Draft of the proposed Writ, in the same Manner as when a Crown Charter or Precept is now applied for; and the Deed of Relinquishment, with the Acceptance and Writ of Investiture thereon, shall be officially transmitted to the Director of Chancery, and recorded in the same Manner in which Crown Charters are now in use to be recorded, and shall thereafter be delivered to the Vassal or his Agent on payment of the same Fees as are now payable for recording a Charter in Chancery; and the Investiture completed upon such Relinquishment of the Superiority shall be as effectual as if the Granter of the Deed of Relinquishment had completed his Title to the Superiority, and had thereafter conveyed the same to the Vassal, and the latter, after having completed his Titles under the Oversuperior, had resigned *ad remanentiam* in his own Hands: Provided always, that the Investiture so completed shall not in any respect extend the Rights or Interests of such Oversuperior, and that he shall be entitled to no more than the Duties and Casualties, taxed or untaxed, to which he would have been entitled if the Granter of the Deed of Relinquishment had remained his Vassal.

XXV. Where the Right of Superiority so relinquished shall form Part of an Estate held under a Deed of strict Entail, such Relinquishment shall not operate as a Contravention of such Entail, anything contained in the Deed of Entail or any Act of Parliament notwithstanding; and the Price agreed to be paid for such Superiority so relinquished, if any, shall be consigned by the Vassal in One of the Chartered Banks in *Scotland*, subject to the Orders of the Court of Session, and shall be applicable and applied in such and the like Manner and to such and the like Purposes as Purchase Money or Compensation coming to Parties having limited Interests is made applicable, under the Lands Clauses

Application of
Price of entailed
Superiorities.

Consolidation (*Scotland*) Act, 1845, or under the Act of the Eleventh and Twelfth *Victoria*, Chapter Thirty-six, intituled *An Act for the Amendment of the Law of Entail in Scotland*, or under an Act of the Sixteenth and Seventeenth *Victoria*, Chapter Ninety-four, intituled *An Act to extend the Benefits of the Act of the Eleventh and Twelfth Years of Her present Majesty for the Amendment of the Law of Entail in Scotland*; and for that Purpose it shall be competent to the Heir of Entail in possession to present a summary Petition to the Court of Session, praying to have the Price so applied, and such Petition shall set forth the Names, Designations, and Places of Abode of those Heirs of Entail whose Consents would be required to the Execution of an Instrument of Disentail; and on such Petition being served on such Parties, and being intimated in the Minute Book and on the Walls in common Form, it shall be competent for the Court to direct the Price to be applied to such of the said Purposes as may appear to them to be most expedient: Provided always, that where the Sums agreed to be paid for all the Superiorities which form Part of an entailed Estate shall not exceed the Sum of Two Hundred Pounds such Sums shall belong to the Heir in Possession, and the Court shall direct such Sums to be paid to him: Provided also, that the Price of such Superiorities may be applied by the Heir in Possession to such Purposes and in such Manner as may be authorised by any Private Act of Parliament authorising the Sale of the entailed Estate or any Portion thereof, and the Application of the Price thereof.

Price of
Superiorities
of
entailed
Lands may
be charged
on the
entailed
Estate.

XXVI. Where the Lands of which the Superiority is so relinquished shall be held by the Vassal under a Deed of strict Entail, the Vassal in such Lands shall be entitled and he is hereby authorised to grant a Bond and Disposition in Security over the entailed Estate for the full Amount of the Price paid for the relinquished Superiority, together with all Expenses incurred in the relative Proceedings, including the estimated Expense of such Bond and Disposition in Security, and his granting such Bond and Disposition in Security shall not operate as a Contravention of such Entail, anything contained in the Deed of Entail or any Act of Parliament notwithstanding: Provided always, that such Bond and Disposition in Security shall be granted with the Consent of those Heirs of Entail whose Consents would be required to the Execution of an Instrument of Disentail of the Lands, or under the Authority of a Judicial Warrant or Decree of the Court of Session pronounced on a summary Petition by the Heir of Entail in possession praying for such Warrant; and the Proceedings under such Petition shall be the same or as nearly as may be the

same as the Proceedings under a Petition to charge an entailed Estate with Provisions to younger Children, as authorised by the said Acts of the Eleventh and Twelfth *Victoria*, Chapter Thirty-six, and Sixteenth and Seventeenth *Victoria*, Chapter Ninety-four: Provided always, that it shall not be necessary that such Petition should be publicly advertised in the Gazette or any Newspaper, but that Service and Intimation only shall be made in common Form.

XXVII. In Actions of Constitution and Adjudication ^{Diligence} against an Apparent Heir on account of his Ancestor's ^{against} Debt or Obligation, for the Purpose of attaching the An- ^{Apparent} Heir's Heritable Estate, it shall not be necessary to raise a separate Summons of Constitution and a separate Summons of Adjudication, but both Actions may be combined in One Summons, whether the Heir renounce the Succession or not; and Actions of Constitution, and Actions of Constitution and Adjudication, against an Apparent Heir, on account of his Ancestor's Debt or Obligation, for the Purpose of attaching the Ancestor's Heritable Estate, and Actions of Adjudication against such Heir on account of his own Debt or Obligation, for the purpose of attaching such Estate, may be insisted in at any Time after the Lapse of Six Months from the Date of his becoming Apparent Heir, any Law or Practice to the contrary notwithstanding; and in all such Cases a Decree of Adjudication shall be held equivalent to and shall have the legal Operation and Effect of a Conveyance from such Ancestor of the Lands adjudged in favour of the Adjudger, to be holden in the same Manner as the Ancestor held or might have held the same, except in the Case where the Subjects contained in the Decree of Adjudication are Heritable Securities, in which Case the Adjudger or other Party in right of the Decree on recording the Decree in the appropriate Register of Sasines shall be in the same position as if an Assignment of such Heritable Securities had been granted in his Favour by the Ancestor whose Estate is adjudged, and as if such Assignment had been duly recorded in the appropriate Register of Sasines at the Date of recording such Decree; but the Right of the Superior to the Composition payable by an Adjudger as due under the existing Law is hereby reserved entire, and the Adjudger by recording the Decree of Adjudication in the Register of Sasines, and such Adjudger or any Person in his Right by expeding and recording in such Register a Notarial Instrument proceeding on such Decree, with or without any connecting Title, in virtue of this Act, shall become indebted in such Composition to the Superior, and shall be bound to pay the same on the Superior tendering a Charter of Confirmation, whether such Charter shall be

accepted or not, and the Superior shall be entitled to recover such Composition as accords of Law.

Prohibition
against
Subinfen-
dation not
to be af-
fected.

XXVIII. Where the Investiture of any Lands has imposed or shall impose a Prohibition against Subinfendation or against alternative holding, nothing contained in this Act shall operate to authorise Subinfendation or an alternative holding in respect to such Lands; and nothing in this Act contained shall be construed to take away or impair any of the Rights or Remedies competent to a Superior against his Vassal lying out unentered.

Obliga-
tions ap-
pointed to
be inserted
in Instru-
ments of
Sasines shall
be inserted
in Notarial
Instru-
ments.

XXIX. Where any Obligation, Burden, Condition, Qualification, or other Matter has been or shall be appointed to be inserted or referred to in the Instruments of Sasine or of Resignation *ad remanentiam* applicable to any Lands, such Obligation, Burden, Condition, Qualification, or other Matter shall be inserted or referred to in any Notarial Instrument applicable to such Lands to be expedé in virtue of this Act.

Case of
Party
where Do-
micle is
unknown.

XXX. Where a General Service only is intended to be carried through by an Heir, it shall not be necessary, if the Deceased died upwards of Forty Years prior to the Date of presenting the Petition for General Service as Heir to him, to state or prove the County within which the Deceased had his ordinary or principal Domicile at the Time of his Death, or that such Domicile was furth of *Scotland*; but in such Cases it shall be sufficient (so far as regards the Domicile of the Deceased) for the Heir to state in his Petition, and if required in the Court of Service to make Oath, that he is unable to prove at what Place the Deceased had his ordinary or principal Domicile at the Time of his Death: Provided always, that in every such Case the Petition for General Service as Heir to the Deceased shall be dealt with, and all relative Procedure shall be regulated, in or as nearly as may be in the same Manner as if it had been proved that the Deceased had at the Time of his Death his ordinary or principal Domicile furth of *Scotland*.

Power to
record of
new the
Convey-
ance, &c.
with the
Original,
or a new
Warrant
of Regis-
tration, &c.

XXXI. In case of any Error or Defect in any Notarial Instrument expedé in virtue of the Act Eighth and Ninth *Victoria*, Chapter Thirty-five, or in any Notarial Instrument to be expedé in virtue of that Act or of the present Act, or in the recording of any such Instrument, or of any Instrument of Resignation *ad remanentiam*, or in the recording of any Conveyance or Procuratory of Resignation *ad remanentiam* or Warrant of Registration to be recorded in the Register of Sasines in virtue of the present Act, it shall be competent of new to make and record a Notarial Instrument or Instrument of Resignation, or of new to record the Conveyance or Procuratory of Resignation with the original or a new

Warrant of Registration, as the Case may require; and such new Notarial Instrument or Instrument of Resignation so expedite and recorded, or such Conveyance or Procuratory of Resignation so of new recorded with the original or new Warrant of Registration, as the Case may require, shall from the Date of recording thereof have the same Effect as if no previous Notarial Instrument or Instrument of Resignation had been expedite or recorded, or as if such Conveyance or Procuratory of Resignation and original Warrant of Registration had not been previously recorded.

XXXII. It shall not be necessary to append the Seal appointed by the Treaty of Union to be kept and used in Scotland, in place of the Great Seal thereof formerly in use, to any Charter from Her Majesty or Her Royal Successors, or the Seal of His Royal Highness the Prince and Steward of Scotland to any Charter from His Royal Highness or His Royal Successors, unless the Receivers of such Charters shall require the appropriate Seal to be appended; and in framing such Charters hereafter the Statement with reference to the Seal "that the same is accordingly appended" now in use to be inserted in the Testing Clause shall be omitted, except in Cases where the Seal is actually appended; and such Charter shall be in all respects as valid and effectual without the Seal as if the same had been appended thereto.

XXXIII. The Act of the Sixth and Seventh of His late Majesty King William the Fourth, Chapter Thirty-three, intituled *An Act to amend and regulate the Law of Scotland as to Erasures in Instruments of Sasine and of Registration ad remanentiam*, shall extend and be applicable to Notarial Instruments, and Instruments of Resignation *ad remanentiam* authorised by this Act, and to Notarial Instruments expedite and to be expedite under the Act of Eighth and Ninth of Victoria, Chapter Thirty-one.

XXXIV. All Deeds, Writs, and Instruments whatever, mentioned or not mentioned in this Act, having a Testing Clause, may be partly written and partly printed or engraved: Provided always, that in the Testing Clause the Date, if any, and the Names and Designations of the Witnesses, and the Number of the Pages of the Deed or Instrument, if the Number be specified, and the Name and Designation of the Writer of the written Portions of the Body of the Deed, Writ, or Instrument, and of the written Portions of the Testing Clause, shall be expressed at Length in Writing; and such Deeds, Writs, and Instruments shall be valid and effectual in the same Manner as if they had been wholly in Writing.

Extent of
Act.

XXXV. This Act shall not extend or apply to the Titles of Lands held by Burgage Tenure, or by any similar Mode of Tenure known and effectual in Law.

Interpre-
tation of
Terms.

XXXVI. The following Words in this Act and in the Schedules annexed to this Act shall have the several Meanings hereby assigned to them, unless there be something in the Subject or Context repugnant to such Construction; that is to say, the Word "Deed" and the Word "Conveyance" shall extend to and include Original Charters, Charters and Writs of Resignation, Charters of Adjudication and of Sale, Dispositions, Bonds and Dispositions in Security, Bonds of Annuity and of Annual Rent, and other Heritable Bonds, Feu Contracts, Contracts of Ground Annual, Decrees of Adjudication, Decrees of Sale and of Special Service, Precepts from Chancery, Precepts and Writs of Clare constat, Writs of Acknowledgment, Contracts of Excambion, and other Deeds and Decrees by which Lands are conveyed, or Rights in Lands, either absolute or redeemable or in Security, are constituted or conveyed, and official Extracts of any such Deeds, Conveyances, and Decrees, and all Codicils, Deeds of Nomination, Decrees of Declarator, and other Writings bearing Reference to Conveyances separately granted, and naming or appointing Persons to exercise or enjoy the Rights or Powers conferred by such Conveyances, shall be deemed and taken for the Purposes of this Act to be Parts of the Conveyances to which they separately bear Reference; the Word "Lands" shall extend to and include Lands, Houses, Teinds, Fishings, Patronages, Mills, Mines, Minerals, and in general all Heritable Subjects, Securities, and Rights: the Word "Instrument" shall extend to and include all Notarial Instruments authorised by this Act, and also Instruments of Sasine; the Words "Notarial Instruments" shall include only the Notarial Instruments authorised by this Act.

Short
Title.

XXXVII. This Act may be cited for all Purposes as "The Titles to Land (*Scotland*) Act, 1858."

SCHEDULES referred to in the foregoing Act.

SCHEDULE (A.)

No. 1.

Varrant of Registration to be written on a Conveyance when presented without Assignment apart or Notarial Instrument.

Register on behalf of *A.B.* (*insert Designation*) [*or Register, &c. along with Assignment (or Assignations) (or Writ of Resignation) thereon*] (*or otherwise, as the Case may be*).

(Signed) *A.B.*
 [*or*] *C.D., W.S., Edinburgh.*
 (*or, as the Case may be,*) Agent of the said *A.B.*

No. 2.

Varrant of Registration to be written on a Conveyance when presented with Assignment apart or Notarial Instrument.

Register on behalf of *A.B.* (*insert Designation*) along with the Assignment [*or Assignations or Notarial Instrument*] docketed with reference hereto (*or otherwise, as the Case may be*).

(Signed) *A.B.*
 [*or*] *C.D., W.S., Edinburgh.*
 (*or, as the Case may be,*) Agent of the said *A.B.*

SCHEDULE (B.)

Notarial Instrument in favour of Donee or his Assignee, &c.

At _____ there was by [*or on behalf of*] *A.B.* of _____, Esquire, presented to me, Notary Public subscribing, a Disposition [*or other Deed, or an Extract of a Deed, as the Case may be,*] granted by *C.D.* of *Y.*, Esquire, and bearing Date [*insert the Date*], by which Disposition the said *C.D.* sold, alienated, and disposed to the said *A.B.* [*or gave, granted, and disposed, or otherwise, as the Case may be, to the said A.B.*] [*or to E.F.*], and his Heirs and Assignees [*insert the Destination, if any,*] heritably and irredeemably or redeemably, or in Liferent, or otherwise, as the Case may be, all and whole [*here insert the Description of the Subjects conveyed; and the Deed be granted under the Burden of a Real Lien or Servitude, or any other Incumbrance, Condition, or Qualification of the Right, or under Redemption, add here*], "but always under the Burden of a Real Lien," &c. [*as the Case may be*]. [*If the Party expeding the Instrument be other than the original Donees, add*] as also there was presented to me [*here specify the Title or Series of Titles by*

which the Party acquired Right, and the Nature and Extent of his Right], whereupon this Instrument is taken by the said A.B. in the Hands of G.H. [insert Name and Designation of Notary Public], in the Terms of "The Titles to Land (Scotland) Act, 1858." In witness whereof [here insert a Testing Clause, as in Instrument of Sasine].

I.K. Witness.
L.M. Witness.

(Signed) G.H.,
Notary Public.

SCHEDULE (C.)

Clause of Direction specifying Part of Deed which Grantor desires to be recorded.

And I direct to be recorded in the Register of Sasines the Part of this Deed from its Commencement to the Words (insert Words) on the Line of the Page [and also the Part from the Words (insert Words) on the Line of the Page to the Words (insert Words) on the Line of the Page] [or I direct the whole of this Deed to be recorded in the Register of Sasines with the Exception of the Part] [or Parts, as the Case may be, specifying the Part or Parts excepted, as above].

SCHEDULE (D.)

Instrument of Resignation ad remanentiam.

At there was by [or, on behalf of] A.B. [here insert the Name and Designation of the Superior] presented to me, Notary Public subscribing, a Disposition, dated the Day of , granted by C.D., [here insert the Name and Designation of the Vassal,] being the Vassal in the Lands after described, holding the same of the said A.B. as his Superior thereof, by which Disposition the said C.D. disposed to the said A.B., and his Heirs and Assignees whomsoever, [or, as the Case may be,] all and whole [here insert Description of the Lands]: in virtue of which Disposition the said Lands were resigned in the Hands of the said A.B. [or, "in the Hands of E.F., as his Commissioner, duly authorised,] conform to Commission" [describe by Date and other Particulars "as in the Hands of the said A.B. himself"] [or, "in the Hands of E.F., being the known Agent of the said A.B., and as such duly authorised, in virtue of the Act of the Eighth and Ninth Years of the Reign of Her Majesty Queen Victoria, Chapter Thirty-five, intituled 'An Act to simplify the Form and Diminish the Expense of obtaining Infestment in 'Heritable Property in Scotland,' as in the Hands of the said A.B. himself,"] ad perpetuam remanentiam, and to the Effect that the Right of Property of the foresaid Lands and others might be united and consolidated with the Right of Superiority of the

SCHEDULE (E.)

Victoria, &c. We confirm this Deed [or Decree, or Instrument, or otherwise, as the Case may be,] in favour of C.D., but only in so far as consistent with the [here specify a Charter or other Writ, containing the Tenendas and Reddendo, &c.], and with our own Rights. [If the Reddendo is to be different from that in the Charter or other Writ, specify it here.] Given at Edinburgh, the _____ Day of _____ in the Year _____

Note.—When the Writ of Confirmation is to be granted by or on behalf of the Prince or Steward of Scotland, his Highness' other Titles need not be added.

Victoria, &c. We, in respect of the within Clause of Resignation,
dispose to C.D. the Lands contained in this Deed in his Favour [or
in favour of A.B., or otherwise, as the Case may be, specifying shortly
the connecting Title], but only in so far as consistent with the
[here specify a Charter or other Writ containing the Tenendas and
Reddendo, &c.] and with our own Rights. [If the Reddendo is to
be different from that in the Charter or other Writ, specify it here.]
Given at Edinburgh, the Day of in the Year

Note.—When the Writ of Resignation is granted by or on behalf of the Prince or Steward of Scotland, his Highness' other Titles need not be added.

Victoria, &c. Whereas by Decree of General Service, or "or
"Special Service," as the Case may be, of A.B. [here insert the Name
and Designation of the Heir], dated [here insert the Date of the
Decree], and recorded in Chancery [here insert the Date of Registration],
and other authentic Instruments and Documents, it clearly
appears that C.D. [here insert the Name and Designation of the
Ancestor] died last vest and seised as of Fee in [here describe the

Lands, &c., and where there are Conditions of Entail, insert them, or make a competent Reference to them, and in Entails with Clause of Registration as instead of the irritant and resolute Clauses, or of the prohibitory, irritant, and resolute Clauses, refer to the Clause of Registration, and in all Entail Cases describe the Deed of Entail or other Deed of Provision by Date and Date of Registration, and insert or competently refer to the Destination, and where there are any other Burdens or Qualifications insert or make a competent Reference to them.] And that in virtue of [here describe the Charter or Precept and Sasine, or recorded Charter or Precept, or other Writ or Writs forming the last Investiture, by Dates and Dates of Registration.] And that the said A.B. is eldest Son and nearest and lawful Heir of the said C.D. [or whatever Relationship and Character of Heir the Party holds, here state it.] Therefore we hereby declare the said A.B. to be the Heir entitled to succeed to the said C.D. in the said Lands to be holden of Us and our Royal Successors, in manner and for Payment of the Duties specified in the [here specify a Charter or other Writ containing the Tenendas and Reddendo. If the Reddendo is different from that in the Charter or other Writ, specify it here.]

Given at Edinburgh, the _____ Day of _____ in the
Year _____

(Signed by the Director of Chancery or his Depute or Substitute.)

Note.—When the Precept is to be granted by or on behalf of the Prince and Steward of Scotland, his Highness' other Titles need not be added.

SCHEDULE (H.)

Notarial Instrument in favour of a General Donee, or his Assignee, &c.

At _____ there was by [or on behalf of] A.B. of Z. presented to me, Notary Public subscribing, a Disposition [or other Deed or Instrument], recorded in the [specify Register of Sasine and Date of recording], by which recorded Disposition [or other Deed or Instrument] C.D. of Y. was vest in all and whole [here describe the Lands]; as also there was presented to me a general Disposition [or other Deed, or an Extract of a Deed], granted by the said C.D., and bearing Date [here insert Date], by which general Disposition the said C.D. gave, granted, and disposed [or otherwise, as the Case may be,] to the said A.B., and his Heirs and Assignees [or otherwise, as the Case may be], heritably and irredeemably [or in Liferent, or otherwise, as the Case may be], all and sundry the whole Heritable Estate of which he was [or might die] possessed. [If the Deed be granted under any Real Burden or Condition or Qualification, add here, "but always under the Burden of the Real "Lien, &c.;" and if the Deed be granted in trust, or for specific

Purposes, add, "but always in trust or for the Uses and Purposes "mentioned in said Deed." If the Party expeding the Instrument be other than the original Donee, add, "as also there was presented "to me" (here specify the Title or Series of Titles by which the Party acquired Right, and the Nature and Extent of his Right.)] Whereupon, &c., as in Schedule (B.)

SCHEDULE (I.)

No. 1.

Assignment of an unrecorded Conveyance.

I A.B., in consideration of, &c. [*or otherwise, as the Case may be*], hereby assign to C.D., and his Heirs and Assignees [*or otherwise, as the Case may be*], the Disposition [*or other Deed, specifying the Nature of the Deed*], granted by E.F., dated, &c., by which he conveyed the Lands of X., as therein described, to me [*or otherwise, as the Case may be, specifying the connecting Title, and the Nature and Extent of the Right conveyed. State also the Term of the Assignee's Entry, and other Particulars, if any ought to be specified*]. In witness whereof [*here insert a Testing Clause in the usual Form*].

No. 2.

Assignment of an unrecorded Conveyance written upon the Conveyance.

I A.B., in consideration of, &c. [*or otherwise, as the Case may be*], hereby assign to C.D., and his Heirs and Assignees [*or otherwise, as the Case may be*], the foregoing Disposition of the Lands of X., as therein described, granted in my Favour [*or otherwise, as the Case may be, specifying the connecting Title and the Nature and Extent of the Right conveyed. State also the Term of the Assignee's Entry, and other Particulars, if any ought to be specified*]. In witness whereof [*here insert a Testing Clause in the usual Form*].

SCHEDULE (K.)

Notarial Instrument in favour of an Assignee to an unrecorded Conveyance to be recorded along with the Conveyance.

At there was by [*or on behalf of*] A.B. of Z., Esquire, presented to me, Notary Public subscribing, a Disposition [*or other Deed, as the Case may be, specifying the Nature of the Deed*], granted by C.D. of Y., Esquire, and bearing Date [*insert Date*], by which Disposition the said C.D. conveyed to E.F. the Lands of X., as therein described, and which Disposition is to be recorded in the Register of Sasines along with this Instrument; as also there was presented to me [*here specify the Title or Series of*

Titles by which A.B. acquired Right, and the Nature and Extent of his Right], whereupon, &c., as in *Schedule (B.)*

I.K., Witness.

L.M., Witness.

(Signed)

GH.,
Notary Public.

SCHEDULE (L.)

No. 1.

Clause of Reference to particular Description contained in a prior Deed.

[After giving the leading Name or Names or other short distinctive Description of the Lands conveyed, and the Name of the County and of the Parish or supposed Parish, add] "as particularly described in the Disposition [or other Deed, as the Case may be,] granted by C.D., and bearing Date [here insert Date], and recorded in the [specify the Register of Sasines] on the _____ Day of _____ in the Year _____," [or "as particularly described in the Instrument of Sasine or Notarial Instrument recorded, &c., or as the Case may be."] [If Part only of Lands is conveyed, describe such Part, and add "being Part of the Lands particularly described, &c.;" or, thus "as particularly described, &c., with the Exception of" and describe the Part excepted].

No. 2.

Clause of Reference to Conveyance, containing General Designation of Lands.

[After giving the leading Name or Names or other short distinctive Description of the Lands conveyed, and the Name of the County and Parish or supposed Parish, add] "as particularly described in the Disposition [or other Deed, as the Case may be,] granted by C.D., and bearing Date [here insert Date], and recorded in the [specify the Register of Sasines] on the _____ Day of _____ in the Year _____, and in which the Lands herein contained are declared to be designed and known by the said Name of [here insert Name,] [or "as particularly described in the Instrument of Sasine or Notarial Instrument recorded, &c., and in which the Lands herein contained are declared, &c.""] [If Part only of Lands is conveyed, then follow Form for similar Case given in Schedule (I.) No. 1.]

No. 3.

Clause of Reference to Destinations in Entails.

[After inserting such Part of the Destination as may be thought necessary, add] "and to the other Heirs specified and contained in a Disposition and Deed of Entail of the said Lands executed by the

deceased *E.F.*, bearing Date the _____ Day of _____ in
 the Year _____, and recorded in the Register of Tailzies
 on the _____ Day of _____ in the Year _____,”
 [or “in the said Disposition and Deed of Entail dated and recorded
 as aforesaid,” or “in a Deed [or Instrument] recorded [specify
Register of Sasines] upon the _____ Day of _____
 in the Year _____”].

SCHEDULE (M.)

*Notarial Instrument in favour of a Trustee in a Sequestration, or of
 Liquidators of Joint Stock Companies.*

At _____ there was, by [or on behalf of] *A.B.*,
 as Trustee on the sequestered Estate of *C.D.* [or, as Liquidator
 for winding up the (specify Name of Company)], presented to me,
 Notary Public subscribing, a Disposition [or other Deed or Instru-
 ment] [insert Date] recorded in the [specify Register and Date of
 recording], by which [&c., specify the Title or Series of Titles by
 which the Bankrupt held the Lands]; as also there was presented
 to me an Extract Act and Warrant of Confirmation in favour of the
 said *A.B.*, dated [insert Date] [or here specify the Appointment of
 the Liquidator or Liquidators, and the Date thereof]. Whereupon
 this Instrument, [&c., as in Schedule (B.)].

SCHEDULE (N.)

No. 1.

Deed of Relinquishment of Superiority.

I *A.B.*, immediate lawful Superior of all and whole [here describe
 the Lands], do hereby absolutely and gratuitously [or in consideration
 of the Sum of _____ Pounds paid to me, or, if the Superiority is
 entailed, “consigned in the [specify Bank] subject to the Orders
 of the Court of Session,”] relinquish and renounce my Right of
 Superiority of the said lands in favour of *C.D.*, my immediate
 Vassal, and his Successors therein, and declare that the said Lands
 shall no longer be held of me as Superior, but shall be held of my
 immediate lawful Superior in all Time to come. In witness whereof
 [here insert usual Testing Clause].

No. 2.

Acceptance by Vassal written on Deed of Relinquishment.

I *C.D.*, the immediate Vassal in the Lands described in this
 Deed, accept the Relinquishment of the Superiority of the said
 Lands. In witness whereof [here insert usual Testing Clause].

No. 3.

Crown Writ of Investiture written on Deed of Relinquishment.

Victoria, &c. We, lawful Superior of the Lands contained in this Deed, accept and receive *C.D.*, and his Heirs and Successors whomsoever, [*or otherwise, according to the Destination contained in the Title to the Lands,*] in place of *E.F.*, and his Heirs and Successors in virtue of the above Deed of Relinquishment, and Acceptance thereof. To be holden the said Lands by the said *C.D.* and his foresaids [*specify the Tenendas and Reddendo contained in the Titles of the relinquished Superiority, also insert or competently refer to the Conditions and Limitations, if any, under which the Lands are held by the Vassal as in Writ of Clare constat*]. Given at Edinburgh,

the Day of in the Year

(Signed by the Presenter of Signatures.)

Note.—When the Writ of Investiture is to be granted by or on behalf of the Prince or Steward of Scotland, his Highness' other Titles need not be added.

CAP. LXXIX.

An Act to amend the Law relating to Cheques or Drafts on Bankers.—[2d August 1858.]

WHEREAS it is expedient to amend the Law relating to Cheques or Drafts on Bankers: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. Whenever a Cheque or Draft on any Banker, payable to Bearer, or to Order, on Demand, shall be issued, crossed with the Name of a Banker, or with Two transverse Lines with the Words "and Company" or any Abbreviation thereof, such Crossing shall be deemed a material Part of the Cheque or Draft, and, except as hereafter mentioned, shall not be obliterated or added to or altered by any Person whomsoever after the issuing thereof; and the Banker upon whom such Cheque or Draft shall be drawn shall not pay such Cheque or Draft to any other than the Banker with whose Name such Cheque or Draft shall be so crossed, or if the same be crossed as aforesaid without a Banker's Name, to any other than a Banker.

II. Whenever any such Cheque or Draft shall have been issued uncrossed, or shall be crossed with the Words "and Company" or any Abbreviation thereof, and without the Name of any Banker, any lawful Holder of such Cheque or Draft, while the same remains so uncrossed, or crossed with the Words "and Company" or any Abbreviation thereof, without the Name of any Banker, may cross the same with the Name of a Banker; and whenever any such Cheque or Draft shall be uncrossed, any such lawful Holder may cross the same with the Words "and Company" or any Abbreviation thereof, with or without the Name of a Banker; and any such Crossing as in this Section mentioned shall be deemed a material Part of the Cheque or Draft, and shall not be obliterated or added to or altered by any Person whomsoever after the making thereof; and the Banker upon whom such Cheque or Draft shall be drawn shall not pay such Cheque or Draft to any other than the Banker with whose Name such Cheque or Draft shall be so crossed as last aforesaid.

III. If any Person shall obliterate, add to, or alter any such Crossing with Intent to defraud, or offer, utter, dispose of, or put off with Intent to defraud, any Cheque or

with Intent to defraud, guilty of Felony.

Draft on a Banker, whereon such fraudulent Obliteration, Addition, or Alteration has been made, knowing it to have been so made, such Person shall be guilty of Felony, and, being convicted thereof, shall be liable, at the Discretion of the Court, to be transported beyond the Seas for Life, or to such other Punishment as is enacted and provided for those guilty of Forgery of Bills of Exchange in the Statute in that Case made and provided.

Banker not to be responsible for paying a Cheque which does not plainly appear to have been crossed or altered.

IV. Provided always, That any Banker paying a Cheque or Draft which does not at the Time when it is presented for Payment plainly appear to be or to have been crossed as aforesaid, or to have been obliterated, added to, or altered as aforesaid, shall not be in any way responsible or incur any Liability, nor shall such Payment be questioned by reason of such Cheque having been so crossed as aforesaid, or having been so obliterated, added to, or altered as aforesaid, and of his having paid the same to a Person other than a Banker, or other than the Banker with whose Name such Cheque or Draft shall have been so crossed, unless such Banker shall have acted *malâ fide*, or been guilty of Negligence in so paying such Cheque.

Interpretation of the Word "Banker."

V. In the construction of this Act the Word "Banker" shall include any Person or Persons, or Corporation, or Joint Stock Company, acting as a Banker or Bankers.

CAP. LXXXIII.

An Act to make Provision for the better Government and Discipline of the Universities of Scotland, and improving and regulating the Course of Study therein; and for the Union of the two Universities and Colleges of Aberdeen.
—[2d August 1858.]

WHEREAS it is expedient for the Advancement of Religion and Learning to make Provision for the better Government and Discipline of the Universities in Scotland, viz., the Universities of *St Andrew's, Glasgow, Aberdeen, and Edinburgh*, and for improving and regulating the Course of Study therein: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

King's College and Marischal College, Aberdeen, to be

I. From and after such Date as may be fixed by the Commissioners herein-after appointed by special Ordinance, approved by Her Majesty in Council, the "University and King's College of Aberdeen" and "Marischal

College and University of Aberdeen shall be united and incorporated into One University and College, in all Time coming thereafter, under the Style and Title of the "University of *Aberdeen*;" and the said united University shall take rank among the Universities of *Scotland* as from the Date of Erection of *King's College* and University, viz., the Year One thousand four hundred and ninety-four, and all the Funds, Properties, and Revenues now pertaining or belonging in any manner of way to the "University and *King's College*," or to "*Marischal College* and University," shall in Time coming thereafter pertain and belong to the "University of *Aberdeen*." united under the Title of "University of Aberdeen."

II. The Chancellor of each of the Universities of *St Andrew's*, *Glasgow*, and *Aberdeen* shall be elected by the other Members of the General Council herein-after mentioned; and in Time coming there shall be a Chancellor of the University of *Edinburgh*, to be elected in like Manner: Provided always, that the present Chancellors of *Saint Andrew's* and *Glasgow* shall continue in Office for Life, and the present Chancellor of the University and *King's College* of *Aberdeen*, and the present Chancellor of *Marischal College* and University of *Aberdeen*, shall, during their joint Lives, be joint Chancellors of the University of *Aberdeen*, and the Survivor shall be sole Chancellor during his Survivance, and thereafter a Chancellor shall be appointed in manner herein provided; provided also, that the Chancellor of each of the said Universities shall hold his Office for Life; the Chancellor in each University shall have Power to appoint a Vice Chancellor, who may in the Absence of the Chancellor discharge his Office in so far as regards conferring Degrees, but in no other respect. Appointment of Chancellors.

III. The Principals in the Universities of *Glasgow*, *Aberdeen*, and *Edinburgh*, appointed in Time to come, shall not, as such, be or be deemed Professors of Divinity, nor shall it be a valid Objection to any Person appointed to the Office of Principal in any of the said Universities that he is a Layman, and no such Office of Principal therein shall fall under or be included in the Terms "Chair of Theology" as used in an Act passed in the Sixteenth and Seventeenth Years of the Reign of Her Majesty Queen *Victoria* (Chapter Eighty-nine), intituled *An Act to regulate Admission to the Lay Chairs in the Universities of Scotland*. Offices of Principal in Glasgow, Aberdeen, and Edinburgh not to be deemed "Chairs of Theology." Vict. c. 89.

IV. From and after the Date or Dates at which this Act shall come into operation, as herein-after provided, there shall be constituted in each of the said Universities a University Court, which shall consist of the Members and possess and exercise the Powers herein-after enacted, and of University Courts to be constituted.

which the Rector shall be the ordinary President, with a deliberative and a casting Vote.

Powers
of the
Senatus
Academi-
cus and
Principal.

V. The *Senatus Academicus* of each of the said Universities shall consist of the Principal or Principals and whole Professors in each University, and shall possess and exercise the Powers heretofore belonging to a *Senatus Academicus* in so far as the same are not modified or altered by or in pursuance of the Provisions of this Act, and shall superintend and regulate the Teaching and Discipline of the University, and administer its Property and Revenues, subject to the Control and Review of the University Court, as herein-after provided; One Third of the *Senatus* shall be a Quorum; and the Principal, or the Senior Principal if more than One, shall be the ordinary President of the *Senatus Academicus*, with a deliberative and a casting Vote; and the Principal shall be bound to undertake and perform such Duties of teaching and lecturing as may be assigned to him by the Commissioners herein-after appointed during the Continuance of their Powers, and thereafter by the University Court.

General
Councils
of the Uni-
versities to
be consti-
tuted.

VI. There shall be in each University a General Council consisting of the Chancellor, of the Members of the University Court, from and after their First Election, of the Professors, of all Masters of Arts of the University, of all Doctors of Medicine of the University who shall have, as Matriculated Students of the University, given regular Attendance on Classes in any of the Faculties in the University during Four complete Sessions, and also of all Persons who within Three Years from and after the passing of this Act shall establish to the Satisfaction of the Commissioners herein-after appointed that they have, as Matriculated Students, given regular Attendance on the Course of Study in the University for Four complete Sessions, or such regular Attendance for Three complete Sessions in the University, and regular Attendance for One such complete Session in any other *Scottish* University, the Attendance for at least Two of such Sessions having been on the Course of Study in the Faculty of Arts: Provided that no Person shall be a Member of the General Council until he has attained the Age of Twenty-one Years complete, and has his Name registered in a Book to be kept for the Purpose by each University, which shall be done on Payment of such annual Fee as shall be fixed by the said Commissioners; and provided also, that no Person shall be a Member of the General Council while he is a Student enrolled in any Class of the University; and the said General Council shall assemble Twice every Year, on such Days as may be fixed by the Commissioners herein-after appointed,

subject to Alteration thereafter from Time to Time by Resolution of the said Council, with the Approval of the University Court, at the Meetings of which Council the Chancellor, and in his Absence the Rector, whom failing, the Principal or Senior Principal, whom failing, the Senior Professor, shall preside, and shall have a deliberative and also a casting Vote : It shall be competent to such Council to take part in the Election of Office-Bearers of the University in manner herein provided, and also to take into their Consideration all Questions affecting the Well-being and Prosperity of the University, and to make Representations from Time to Time on such Questions to the University Court, who shall consider the same, and return to the Council their Deliverance thereon.

VII. The General Council of the University of *Aberdeen* shall consist of the Chancellors or Chancellor, of the Members of the University Court, of the Professors, and of all such Graduates and Students as is herein above provided in regard to the other Universities, whether they be Graduates and Students of the University and *King's College* or of *Marischal College* and University.

General
Council
of the
University
of Aber-
deen to
consist of
Persons
herein
named.

VIII. The University Court of the University of *Saint Andrew's* shall consist of the following Members ; viz.,

*Saint An-
drew's.*

1. A Rector to be elected by the Matriculated Students, voting in such Manner as shall be determined by the Commissioners herein-after appointed ;
2. The Senior Principal ;
3. An Assessor to be nominated by the Chancellor ;
4. An Assessor to be nominated by the Rector ;
5. An Assessor to be elected by the General Council ;
6. An Assessor to be elected by the Senatus Academicus :

University
Court, of
whom to
consist.

Four shall be a Quorum ; and the Rector and the Assessor nominated by him shall continue in Office for Three Years, and the other Assessors shall continue in Office for Four Years ; and no Principal or Professor of any University shall be eligible to the Office of Rector or Assessor, except in the Case of the Assessor to be elected by the Senatus Academicus.

IX. The University Court of the University of *Glasgow* shall consist of the following Members ; viz.,

Glasgow.
University
Court, of
whom to
consist.

1. A Rector to be elected by the Matriculated Students, voting by Nations as at present, subject to any Redistribution of Nations or other Regulations to be made by the Commissioners ;
2. The Principal ;
3. The Dean of Faculties ;
4. An Assessor to be nominated by the Chancellor ;

5. An Assessor to be nominated by the Rector;
6. An Assessor to be elected by the General Council of the University;
7. An Assessor to be elected by the *Senatus Academicus* :

Neither the Rector nor any of the Assessors, with the Exception of the Assessor to be elected by the *Senatus Academicus*, shall be a Principal or Professor of any University. The Rector and the Assessor nominated by him shall continue in Office for Three Years, and the other Assessors shall continue in Office for Four Years; and Five Members of the University Court shall be a Quorum; and the Rector and Dean of Faculties and Minister of *Glasgow* shall no longer exercise any Right or Power as ordinary Visitors of the College of *Glasgow* other than is or may be conferred on any of them as Members of the University Court.

Aberdeen.

University
Court, of
whom to
consist.

X. The University Court of the University of *Aberdeen* shall consist of the following Members; viz.,

1. A Rector to be elected by the Matriculated Students, voting according to the present Usage in *Marischal College*, but subject to any Regulations as to voting to be made by the Commissioners;
2. The Principal;
3. An Assessor to be nominated by the Chancellor;
4. An Assessor to be nominated by the Rector;
5. An Assessor to be elected by the General Council of the University;
6. An Assessor to be elected by the *Senatus Academicus* :

Four shall be a Quorum. The Rector and the Assessor nominated by him shall continue in Office Three Years and the other Assessors shall continue in Office for Four Years; and no Principal or Professor of any University shall be eligible to the Office of Rector or Assessor, except in the Case of the Assessor to be elected by the *Senatus Academicus*.

Edinburgh.

University
Court, of
whom to
consist.

XI. The University Court of the University of *Edinburgh* shall consist of the following Members; viz.,

1. A Rector to be elected by the Matriculated Students, voting in such Manner as shall be determined by the Commissioners;
2. The Principal;
3. An Assessor to be nominated by the Chancellor;
4. The Lord Provost of *Edinburgh* for the Time being;
5. An Assessor to be nominated by the Lord Provost, Magistrates, and Town Council of *Edinburgh*;
6. An Assessor to be nominated by the Rector;

7. An Assessor to be elected by the General Council of the University ;

8. An Assessor to be elected by the *Senatus Academicus* :

And no Principal or Professor of any University shall be eligible to the Office of Rector or Assessor, except in the Case of the Assessor to be elected by the *Senatus Academicus* : And the Rector and the Assessor nominated by him shall continue in Office Three Years, and the other Assessors shall continue in Office for Four Years, and Five Members of the University Court shall be a Quorum.

XII. The University Court of each University shall, Powers of University Courts. subject to the Provisions of this Act, have the following Powers ; *viz.*,

1. To review all Decisions of the *Senatus Academicus*, and to be a Court of Appeal from the *Senatus* in every Case except as herein otherwise provided for :
2. To effect Improvements in the internal Arrangements of the University, after due Communication with the *Senatus Academicus*, and with the Sanction of the Chancellor ; provided that all such proposed Improvements shall be submitted to the University Council for their Consideration :
3. To require due Attention on the Part of the Professors to Regulations as to the Mode of Teaching and other Duties imposed on the Professors :
4. To fix and regulate from Time to Time the Fees in the several Classes :
5. Upon sufficient Cause shown, and after due Investigation, to censure a Principal or Professor, or to suspend him from his Office and from the Emoluments thereof, in whole or in part, for any Period not exceeding One Year, or to require him to retire from his Office on a retiring Allowance, or to deprive him of his Office ; and during the Suspension of any Professor to make due Provision for the Teaching of his Class : Provided always, that no such Sentence of Censure, Suspension, or Deprivation, or Requisition on a Professor to retire from Office, shall have any Effect until it has been approved by Her Majesty in Council :
6. To inquire into and control the Administration by the *Senatus Academicus* or Principal and Professors of any College of the Revenue, Expenditure, and all the pecuniary Concerns of the University and of any College therein, including Funds mortified for Bursaries and other Purposes.

Right of
Nomina-
tion to
Profes-
sorships
vested in
University
Courts.

XIII. The Right of Nomination or Presentation to any Professorships within any of the said Universities in Time past, and presently exercised by the Senatus or Faculty thereof, or by One or more of the Professors therein, or by any Member or other Officer thereof, shall be transferred to and in all Time coming be exercised, as regards each University, by the University Court thereof, to be established in manner herein-before provided; and the Right of Nomination or Presentation to the Office of Principal and to all Professorships in the University of *Edinburgh* in Times past, and presently exercised by the Town Council of *Edinburgh*, or by One or more of the Members thereof, either by themselves or conjointly with others, shall be transferred from the said Town Council or Members thereof to and in all Time coming be exercised by Seven Curators to be nominated as follows: Within Two Months from and after the Date at which this Act shall come into operation, as herein-after provided, the Town Council shall nominate Four Curators, and the University Court of the said University shall nominate the remaining Three Curators, and the Curators shall continue in Office for Three Years; and in the event of Vacancies in the Office of Curator occurring from Death, Resignation, or any other Cause, the Vacancies shall, as respects the Four Nominations made by the Town Council, be filled up by the Town Council, and shall, as respects the other Nominations, be filled up by the University Court.

Appoint-
ment of
Commis-
sioners.

XIV. The following Persons (that is to say), his Grace *John George Douglas Campbell* Duke of *Argyll*, the Right Hon. *George Hamilton Gordon* Earl of *Aberdeen*, the Right Honourable *Philip Henry Stanhope* Earl *Stanhope*, the Right Hon. *William David Murray* Earl of *Mansfield*, the Right Hon. *Duncan M'Neill* Lord Justice General and Lord President of the Court of Session, Sir *William Gibson Craig* of *Riccarton*, Baronet, *John Inglis* Esquire, Lord Justice Clerk for *Scotland*, *James Craufurd* Esquire, One of the Senators of the College of Justice, *William Stirling* Esquire, of *Keir*, *James Moncrieff* Esquire, *Alexander Hastie* Esquire, and *Alexander Murray Dunlop* Esquire, shall be Commissioners for the Purposes of this Act, and shall have a Common Seal; and Four of the said Commissioners shall be a Quorum; and the Commissioners may elect One of their Number to be their permanent Chairman, and the permanent Chairman, or in his Absence One of the Commissioners elected and acting as Chairman at any Meeting, shall have both a deliberative and a casting Vote. If any Vacancy occurs in the Number of the Commissioners by means of Death, Resignation, or Incapa-

Her Ma-
jesty may

city to act, Her Majesty may fill up such Vacancy by ^{fill up} Warrant under the Sign Manual. The Powers hereby ^{Vacancies.} conferred on the Commissioners shall be in Force until the ^{Declaration of} First Day of *January* One thousand eight hundred and ^{Powers of} sixty-two; and it shall be lawful to Her Majesty, by and ^{Commissioners.} with the Advice of Her Privy Council, to continue the same until the First Day of *January* One thousand eight hundred and sixty-three, and no longer.

XV. The Commissioners shall possess and exercise the ^{Powers of} following Powers; *viz.*, ^{Commissioners :}

1. To call before them the respective Principals, Profes- ^{To cite and} sors, Regents, Masters, and others bearing Office in ^{examine} the said Universities and the Colleges therein re- ^{Office-} spectively; *viz.*, the University of *St Andrews*, the ^{Bearers in} University of *Glasgow*, the University and *King's* ^{Universi-} *College of Aberdeen*, the University of *Edinburgh*, ^{ties, and} *Marischal College* and University of *Aberdeen*, and ^{require} to examine them as to all Rules and Ordinances ^{Production} now in Force in the said Universities, and to re- ^{of Docu-} quire the Production of all Documents and Ac- ^{ments and} counts relating to any of the said Universities or ^{Accounts;} Colleges:
2. To revise the respective Foundations, Mortifications, ^{To revise} Bursaries, and Donations bestowed on any of the ^{the Foun-} said Universities or Colleges, or for the Benefit of ^{dations,} &c., and ^{and} any Professors, Students, or others therein; and ^{to alter} further, if in the Case of any such Gift or Endow- ^{Trusts ;} ment which has taken effect for more than Fifty Years, and has been held by any of the said Universities or Colleges, or by any other Person in trust for or on behalf of the same or of any Persons therein, it shall appear to the Commissioners that the Interests of Religion and Learning and the main Design of the Donor, so far as is consistent with the Promotion of such Interests, may be better advanced by an Alteration of the Conditions or Directions affecting such Gift or Endowment, it shall be lawful to the Commissioners to alter or modify such Conditions or Directions, and to frame a new Statute or Ordinance for the Application of such Gift or Endowment, in such Manner as may better advance the Purposes thereof:
3. Subject to the Provisions of this Act, to regulate by ^{To Regu-} Ordinance the Powers, Jurisdictions, and Privileges ^{late the} of Chancellors, Rectors, Assessors, Professors, and ^{Powers of} all other Members or Office-Bearers in the said Uni- ^{Office-} versities and Colleges, as also of the *Senatus Aca- ^{Bearers ;} *demicus*, the General Council, and the University*

Court, and their Meetings, as well with respect to the Government, Policy, and Discipline of the University as to the Management and Disposal of the Revenues and Endowments thereof, with Power to abolish unnecessary Offices :

To Regulate Elections of University Officers ;

4. Subject to the Provisions of this Act, to make Regulations as to Time, Place, and Manner of presenting and electing all University Officers : Provided always, that the existing Rights of Nomination or Presentation to any Professorships shall not, except in so far as herein expressly otherwise provided, be thereby affected :

To regulate Course of Study, Exaction of Fees, &c. ;

5. To make Rules for the Management and Ordering of the said Universities, the Manner and Conditions in and under which Students shall be admitted thereto, the Course of Study, and Manner of Teaching therein, the Amount and Exaction of Fees, the Manner of Examination, with the Qualifications, Appointment, and Number of Examiners, and the Amount and Manner of their Remuneration, the granting of Degrees, whether in Arts, Divinity, Law, or Medicine, and to provide that, in so far as shall be practicable, and in the Opinion of the Commissioners conducive to the Well-being of the Universities, and to the Advancement of Learning, the Course of Study, the Manner of Examination, and the Conditions under which Degrees are to be conferred, shall be uniform in all the Universities of Scotland :

To make Ordinances in order to found Professorships and provide for Assistants ;

6. To make Ordinances in order to found new Professorships where they are required, and to provide for the Appointment of Assistants to such Professors as from the Nature and Duties of their Professorships require Assistance, and to provide for the Remuneration of such Assistants, and to provide by whom the Right of presenting or appointing such new Professors and Assistants shall be exercised :

To provide for the due Administration of Revenues and Endowments ;

7. To make such Provision by Ordinance as the Commissioners shall see fit, as well for the due Preservation, Administration, and Disposal of the whole Property, Funds, Rents, Revenues, and Endowments as for the Preservation and Maintenance of all the Fabrics and Buildings of or connected with the Universities and Colleges, and for the better Custody and Management of any Libraries and Museums thereto belonging, or of the Contents thereof, and of any Furniture, Apparatus, or Objects

acquired or to be acquired for the Use of the University, or of any Class therein :

8. To provide by Ordinance, as the Commissioners shall judge expedient, by means of any of the Funds, Property, Rents, Revenues, and Endowments of any University or College, for the Payment and Extinction of any Debts forming a present Burden on such Rents, Revenues, or Endowments respectively :
9. To provide by Special Ordinance, at what Date, with reference to each of the said Universities, the Provisions of this Act shall come into operation :
10. To inquire and report to Her Majesty how far it may be practicable and expedient that a new University should be founded, to be a National University for Scotland :
11. In the event of the Erection of such a University, to make Arrangements, with Consent of the *Scottish* Universities named in this Act, or any of them, for converting them respectively into Colleges, One or more, as the Case may be, of the said National University, and for the due Representation of such Colleges in the Governing Body thereof :

To provide for the Extinction of Debt;

To fix Date when Act to come into operation;

To report on Expediency of founding a National University;

To make Arrangements for converting Universities into Colleges of the said National University.

Provided always, that all Rules, Statutes, and Ordinances to be made by the Commissioners shall be published in the *Edinburgh Gazette* for Four consecutive Weeks, and shall be at the same Time laid before both Houses of Parliament, if Parliament be sitting, or if not, then within Three weeks after the Commencement of the next ensuing Session of Parliament, and shall thereafter be submitted for the Approval of Her Majesty in Council ; and it shall be lawful for any University or any College, and for the Trustees or Patron of any Foundation, Mortification, Bursary, or Endowment, or for any other Person directly affected by any such Rule, Statute, or Ordinance, within One Month after the last Publication thereof in the Gazette, to petition Her Majesty in Council to withhold Her Approbation of the whole or any Part thereof, and it shall be lawful for Her Majesty in Council to refer such Petition to the Commissioners, and to direct that they shall hear the Petitioner or Petitioners by Counsel, and report specially to Her Majesty in Council on the Matter of the said Petition ; and it shall be lawful for Her Majesty, by Order in Council, either to declare Her Approbation of any such Rule, Statute, or Ordinance, in whole or in part, or to signify Her Disapproval thereof, in whole or in part, and in case of such Disapproval the Commissioners may proceed to frame other Statutes or Ordinances in that Behalf, subject to the like Provisions and Conditions as are herein-before enacted ;

and no such Rule, Statute, or Ordinance shall be effectual until it shall have been so published, laid before Parliament, and approved: Provided also, that each of the said Universities shall be governed and conducted according to the existing Law and Practice, until the Commissioners shall have made and published, with reference to such University, an Ordinance providing at what Date this Act shall come into operation, and such Ordinance shall have been approved of by Her Majesty, as herein-before provided.

Scottish Universities may surrender Power of granting Degrees on Grant of Charter for a National University.

XVI. If Her Majesty shall be pleased, at any Time within the Duration of the Commission, to grant a Charter for the Foundation of a National University for *Scotland*, the *Scottish* Universities named in this Act, or any of them, may, if they shall think fit, surrender to the Commissioners the Powers of examining for and of granting Degrees, with or without the Exception of Degrees in Theology, and to become Colleges, One or more, as the Case may be, of the said National University.

No such Surrender &c. to be valid unless signified in Writing by the Chancellor, &c.

XVII. No such Surrender or Consent as is herein-before mentioned of any *Scotch* University named in this Act, with a view to becoming a College or Colleges of a National University for *Scotland*, shall be valid, except it be signified in Writing by the Chancellor and by the University Court of the University concerned therein, nor except it be declared by the said Court that the said Surrender or Consent respectively is given with the Approval of the *Senatus Academicus*, and likewise of the University Council.

Powers of Commissioners as to University of Aberdeen:

XVIII. Without Prejudice to any of the Powers herein-before conferred, the said Commissioners shall, with respect to the University of *Aberdeen*, possess and exercise, subject to the Provisions of this Act, the following Powers:

To determine Number of Professors, and regulate Course of Study;

1. To make Ordinances in order to determine the Number of Professors, and to prescribe and regulate the Course of Study in the several Faculties of Arts, Divinity, Law, and Medicine: Provided that in the Faculty of Arts there shall be a Professor of Greek, a Professor of Humanity, a Professor of Logic, a Professor of Mathematics, a Professor of Moral Philosophy, a Professor of Natural Philosophy, and a Professor of Natural History; or, in the Discretion of the Commissioners, Two Professors in any One or more of such Branches of Instruction in the Faculty of Arts, if it shall appear to be necessary or expedient, with Power to the said Commissioners to determine where the Classes of each of the said Professors shall Assemble; in the Faculty of Divinity there shall be Professors of Systematic Theology, of Oriental Languages, of Church History, and of

Biblical Criticism; in the Faculty of Law a Professor of Law; and in the Faculty of Medicine Professors of the Institutes of Medicine, of the Practice of Medicine, of Chemistry, of Anatomy, of Surgery, of Materia Medica, of Midwifery, of Medical Jurisprudence, of Botany; and such other Professorships in each of the said Faculties as the said Commissioners shall think to be expedient:

2. To make Ordinances in order to abolish such Professorships and other Offices within the said University as are rendered unnecessary by the Union of the Two Universities and Colleges, or to conjoin Two or more of such Professorships, making full Compensation to the Holders of such Offices for all Loss of Emoluments consequent on such Abolition or Conjunction of Offices; and, having regard as far as practicable to the main Design of any existing Gift or Endowment of such Professorships or other Offices, to make such other Arrangements respecting such Professorships and other Offices as may seem expedient; and, having regard as aforesaid, to appropriate the Funds and Revenues belonging or payable to the Holders of such Professorships or other Offices, after the Death, Resignation, or Deprivation of any of the present Incumbents, to any of the following Purposes within the said University; (that is to say,)
 1. For providing retiring Allowances to aged and infirm Principals and Professors:
 2. For providing additional Teaching by means of Assistants to the Professors in any Professorships already established or to be established:
 3. For providing Remuneration to the Examiners appointed in pursuance of this Act:
 4. For increasing the Salaries presently attached to such Professorships, and any other Offices in the University:
 5. For the Endowment of new Professorships;
3. To accept Resignations of the existing Incumbents of such Professorships as they may think fit to abolish, and to make Arrangements for giving reasonable Compensation to such Persons for Loss of Emoluments by such Resignation, or for the Appointment of such Incumbents to other Professorships or other Offices in the said University;
4. To make Ordinances in order to determine in whom for the future shall be vested the Patronage or Right of presenting Professors to each of the Chairs in the

To abolish
Offices rendered unnecessary by the Union,
&c.

To accept
Resignations, &c.;

To determine Right of Patronage;

said University, having regard as far as possible to the Preservation of the existing Rights of Patronage;

To arrange as to Buildings of united Colleges;

To make all necessary Rules, &c.

5. To make Arrangements and Regulations as to the Uses and Purposes to which the Buildings of *King's College* and *Marischal College* respectively shall be appropriated;

6. To make all such Rules and Ordinances as may be necessary for securing good Order and Government, and regulating the Course of Study in the said University:

Provided always, that all Rules, Statutes, and Ordinances to be made by the Commissioners in virtue of the Powers herein conferred shall be published, laid before Parliament, and approved, in like Manner, and shall be subject to the same Provisions and Conditions in all respects, as is provided with respect to the Rules and Ordinances to be made in the Exercise of the Powers conferred on them as regards the whole of the said Universities.

Power to University Court to alter or revoke Statutes passed by Commissioners after Expiration of their Powers.

XIX. During the Subsistence and Exercise of the Powers of the Commissioners, the Powers herein-before conferred on the University Courts shall be exercised in subordination to and so as not to conflict with the Powers of the Commissioners: But any of the Rules, Statutes, and Ordinances to be framed and passed by the Commissioners, as herein-before provided, may, at any Time after the Expiration of the Powers herein conferred on the Commissioners, be altered or revoked by the University Court of the University to which the same are applicable, but only with the Consent, expressed in Writing, of the Chancellor thereof, and with the Approval of Her Majesty in Council.

Instructions issued by Her Majesty to be considered by Commission.

XX. It shall be the Duty of the Commissioners herein appointed to take into their deliberate Consideration any Matters connected with the said Universities to which their Attention may be at any Time called by Instructions issued to them by Her Majesty's Command.

How Parliamentary Grant to be applied.

XXI. The Commissioners of Her Majesty's Treasury shall be empowered to pay out of such Moneys as may be provided by Parliament for the Purpose, by Four equal Quarterly Payments, on the Fifth Day of *January*, the Fifth Day of *April*, the Fifth Day of *July*, and the Tenth Day of *October* in every Year, such Sums of Money as the Commissioners herein appointed shall recommend to be paid for any One or more of the following Purposes; (that is to say,)

1. For providing retiring Allowances to aged and infirm Principals and Professors;
2. For providing additional Teaching by means of As-

sistants to the Professors in any Professorships already established or to be established ;

3. For providing Remuneration to the Examiners appointed in pursuance of this Act ;
4. For increasing the Salaries presently attached to existing Professorships and to any other Offices in the University ;
5. For the Endowment of new Professorships ;
6. For providing full Compensation to the present Holders of Professorships or other Offices for the loss of Emoluments consequent on the Abolition or Conjunction of such Professorships or other Offices in the present Universities and Colleges of *Aberdeen* :

And it is hereby provided that the whole of such Payments shall be subject to whatever Rules, Statutes, and Ordinances the Commissioners herein appointed shall from Time to Time see fit to prescribe in reference thereto : Provided always, that all Rules, Statutes, and Ordinances providing for or affecting the Application or Distribution of such Sums of Money shall be laid before both Houses of Parliament, if Parliament be sitting, or if not, then within Three Weeks after the Commencement of the next ensuing Session of Parliament, and shall thereafter be submitted for the Approval of Her Majesty in Council ; and no such Rule, Statute, or Ordinance shall be effectual until it has been so laid before Parliament and approved of by Her Majesty.

XXII. It shall be lawful to the Commissioners of Her Majesty's Treasury to grant from Time to Time, out of any Moneys to be provided by Parliament for that Purpose, such Sums as shall to them appear necessary for the following Purposes ; (that is to say,) Power to Treasury to grant Moneys for Purposes herein named.

1. For the Salary or other Remuneration of any Clerks or other Officers to be appointed by the Commissioners herein named, with the Consent of the said Commissioners of Her Majesty's Treasury ;
2. For the Expense of providing any Office Accommodation for the Use of the Commissioners herein named, and of defraying the Cost of Books, Stationery, Printing, Postages, and other necessary Expenses connected with the same ;
3. For defraying the whole reasonable Travelling Expenses which may be incurred by the Commissioners herein named, or by any Clerk or other Officer in their Service, in the Execution of the Powers herein conferred.

XXIII. The Commissioners herein appointed shall in the Exercise of their Powers have special Regard to the Commissioners under this

Act specially to regard Reports of Commissioners for visiting Universities of Scotland.

Reports presented by the Commissioners acting under the several Commissions for visiting the Universities of Scotland; viz., a Commission issued by His Majesty King *George* the Fourth on the Twenty-third Day of *July* One thousand eight hundred and twenty-six, renewed by His Majesty King *William* the Fourth on the Twelfth Day of *October* One thousand eight hundred and thirty; a Commission issued by His Majesty King *William* the Fourth on the Twenty-third Day of *November* One thousand eight and thirty-six, re-appointed by Her present Majesty on the Second Day of *October* One thousand eight hundred and thirty-seven; and a Commission issued by Her present Majesty on the Sixteenth Day of *April* One thousand eight hundred and fifty-seven.

Rules, Statutes, &c., when approved, to be entered in a Book, and signed by the Commissioners.

XXIV. All Rules, Statutes, and Ordinances to be made by the Commissioners shall, when approved by Her Majesty as herein-before provided, be inserted in a Book or Books to be signed by the Commissioners or their Quorum, and such Book or Books shall, on the Expiration of the Powers of the Commissioners, be lodged with Her Majesty's Clerk Register for *Scotland*, and shall be preserved among the Public Records, and a Duplicate shall be sent to each of the said Universities of the Rules, Statutes, and Ordinances applicable thereto, and such Rules, Statutes, and Ordinances shall be observed until the same be altered in manner herein-before provided.

Ministers may sue and be sued under Titles herein named.

XXV. The said Universities may sue and be sued under the Style and Title of "*The University of St Andrew's*," "*The University of Glasgow*," "*The University of Aberdeen*," and "*The University of Edinburgh*," respectively.

No Distinction to be henceforward recognized among Professors of Glasgow University.

XXVI. From and after the passing of this Act no Distinction shall be recognized among the Professors of the University of *Glasgow*, but the whole Professors thereof admitted to Chairs heretofore established or which may hereafter be established therein shall be deemed to be and shall be Professors of the University and College of *Glasgow*, and shall all equally exercise the whole Rights and Functions which have heretofore been exercised by any Portion of such Professors: Provided always, that no Claim is hereby given to any Participation in the Income or Emoluments already appropriated to existing Chairs in the said University and College.

Nothing in this Act to affect certain Trusts.

XXVII. Nothing in this Act contained shall be construed to affect any Trusts now vested in and administered by the *Senatus Academicus* of any University or College, or in the Principal and Professors, or any of them, for Purposes unconnected with such University or College; and any such Trusts as are now held and administered by the

Senatus Academicus, or the Principal and Professors of the University and *King's College of Aberdeen*, or of *Marischal College* and University, for Purposes unconnected with such Universities and Colleges, shall from and after the Date at which this Act shall come into operation, as regards the University of *Aberdeen*, be vested in and administered by the Senatus Academicus of the University of *Aberdeen*; and any Trust now administered, in whole or in part, by the Principal of either of the said Universities and Colleges, or by any Professor or Professors thereof, shall from and after the Date aforesaid be in like Manner administered, in whole or in part, by the Principal of the University of *Aberdeen*, or, as the Case may be, by the Professor or Professors who in the said University shall hold the same Professorship as the said Professor or Professors of *King's College* or *Marischal College* respectively.

CAP. LXXXVII.

An Act to continue and amend the Corrupt Practices Prevention Act, 1854.—[2d August 1858.]

WHEREAS an Act was passed in the Session holden in the Seventeenth and Eighteenth Years of Her Majesty, Chapter One hundred and two, "to consolidate and amend the Laws relating to Bribery, Treating, and undue Influence at Elections of Members of Parliament;" and by an Act of the Session holden in the Nineteenth and Twentieth Years of Her Majesty, Chapter Eighty-four, the said first-mentioned Act was continued until the Tenth Day of August One thousand eight hundred and fifty-seven, and thenceforth to the End of the then next Session of Parliament: And whereas it is expedient that the said first-mentioned Act should be further continued and amended: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. It shall be lawful for any Candidate, or his Agent by him appointed in Writing according to the Provisions of the first-mentioned Act, to provide Conveyance for any Voter for the Purpose of polling at an Election and not otherwise, but it shall not be lawful to pay any Money or give any valuable Consideration to a Voter for or in respect of his Travelling Expenses for such Purpose; provided always, that a full, true, and particular Account of all Pay-

ments made for such Conveyance, signed by the Candidate or his Agents, shall be delivered to the Election Auditor, with the Names and Addresses of the Persons to whom such Payments have been made; and the Amount of such Account shall be included in the general Account of the Expenses incurred at any Election to be made out and kept by such Election Auditor.

Section 34
of 17 & 18
Vict. c. 102,
amended as
to further
Remunera-
tion of
Election
Auditors.

II. And whereas by Section Thirty-four of the said first-mentioned Act the Election Auditor is entitled to receive, by way of Remuneration for his Services, Ten Pounds from each Candidate as and by way of First Fee, and a further Commission at the Rate of Two Pounds *per Centum* from each Candidate upon every Payment made by him for or in respect of any Bill, Charge, or Claim sent in to such Election Auditor as therein provided: The said *further* Commission shall be payable only upon any Payment made by the Candidate as aforesaid over and above the Sum of Two hundred Pounds: Provided always, that the Election Auditor shall not be entitled to receive for such First Fee and further Commission more than the Sum of Twenty Pounds in the whole from each Candidate.

Definition
of Candi-
dates.

III. So much of Section Thirty-eight of the said first-mentioned Act as defines the Words "Candidate at an Election" shall be repealed; and in the Construction of the said Act as amended by this Act the Words "Candidate at an Election," and the Words "Candidate at any Election," shall include all Persons elected to serve in Parliament at such Election, and all Persons nominated as Candidates at such Election, or who shall have declared themselves Candidates on or after the Day of the issuing of the Writ for such Election, or after the Dissolution or Vacancy in consequence of which such Writ shall have been issued: Provided that nothing herein contained shall be construed to impose any Liability on any Person nominated without his Consent.

Election
Auditor
not to act
as Election
Agent.

IV. It shall not be lawful for the Election Auditor of any Borough or County, or his Partner or Agent, to act as Election Agent, or as paid Agent in any Capacity, or *Cavasser*, for any Candidate for such Borough or County.

Duration
of Act.

V. The said first-mentioned Act as amended by this Act shall continue in force until the Tenth Day of *August* One thousand eight hundred and fifty-nine, and thenceforth to the End of the then next Session of Parliament.

CAP. LXXXIX.

An Act to amend an Act of the last Session, for the Regulation of the Care and Treatment of Lunatics, and for the Provision, Maintenance, and Regulation of Lunatic Asylums in Scotland.—[2d August 1858.]

WHEREAS by an Act of the Fifty-fifth Year of His Majesty King George the Third, intituled *An Act to regulate Mad-^{ss G. 3,} houses in Scotland*, Sheriffs of Counties are authorised to ^{c. 69.} grant Licences for the Reception and Confinement of Lunatics, and have been in use to license separate Portions or Wards of Poorhouses for the Reception of Pauper Lunatics : And whereas by an Act passed in the last Session of Parliament, intituled *An Act for the Regulation of the Care and Treat-^{20 & 21}ment of Lunatics, and for the Provision, Maintenance, and Regu-^{Vict. a. 71.}lation of Lunatic Asylums*, in Scotland, District Asylums are appointed to be erected for the Reception of Lunatics ; and it is expedient that Provision should be made for the Custody of such Pauper Lunatics till such District Asylums shall be ready for their Reception : Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. It shall be lawful for the General Board of Commis-^{As to Re-}sioners in Lunacy for Scotland to grant to the Governors ^{&c. of} or Keepers of Poorhouses Licences for the Reception of ^{Pauper} Lunatics in Wards set apart for that Purpose, or ^{Lunatics} in detached or separate Portions of such Poorhouses, and ^{in Poor-}houses. from Time to Time to renew or withdraw such Licences ; and it shall also be lawful for Sheriffs of Counties to grant Orders for the Reception and Confinement of such Lunatics in the Wards or Portions of Poorhouses so set apart and licensed, subject always to such Rules, Regulations, and Restrictions as may be framed by the said General Board of Commissioners in Lunacy for the Reception and Treatment of Patients in such Wards or Portions of Poorhouses consistently with the Provisions of the said last-recited Act in regard to Private Asylums.

II. This Act shall continue in force for Five Years from ^{Term of} and after the First Day of *January* One thousand eight ^{Act.} hundred and fifty-eight, and no longer.

CAP. XC.

An Act to regulate the Qualifications of Practitioners in Medicine and Surgery.—[2d August 1858.]

WHEREAS it is expedient that Persons requiring Medical Aid should be enabled to distinguish qualified from unqualified Practitioners: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Short
Title.

I. This Act may for all Purposes be cited as "*The Medical Act.*"

Com-
mence-
ment of
Act.

II. This Act shall commence and take effect from the First Day of *October* One thousand eight hundred and fifty-eight.

Medical
Council.

III. A Council which shall be styled "*The General Council of Medical Education and Registration of the United Kingdom,*" herein-after referred to as the General Council, shall be established, and Branch Councils for *England, Scotland, and Ireland* respectively formed thereout as herein-after mentioned.

Members
of Council.

IV. The General Council shall consist of One Person chosen from Time to Time by each of the following Bodies; (that is to say),

The Royal College of Physicians:

The Royal College of Surgeons of *England*:

The Apothecaries' Society of *London*:

The University of *Oxford*:

The University of *Cambridge*:

The University of *Durham*:

The University of *London*:

The College of Physicians of *Edinburgh*:

The College of Surgeons of *Edinburgh*:

The Faculty of Physicians and Surgeons of *Glasgow*:

One Person chosen from Time to Time by the University of *Edinburgh* and the Two Universities of *Aberdeen* collectively:

One Person chosen from Time to Time by the University of *Glasgow* and the University of *Saint Andrew's* collectively:

One Person chosen from Time to Time by each of the following Bodies:

The King and Queen's College of Physicians in *Ireland*:

The Royal College of Surgeons in *Ireland*:

The Apothecaries' Hall of *Ireland* :

The University of *Dublin* :

The Queen's University in *Ireland* :

And Six Persons to be nominated by Her Majesty with the Advice of Her Privy Council, Four of whom shall be appointed for *England*, One for *Scotland*, and One for *Ireland*; and of a President, to be elected by the General Council.

V. If the said Universities of *Edinburgh* and *Aberdeen*, of *Glasgow* and *Saint Andrew's* respectively, shall not be able to agree upon some One Person to represent them in the Council, it shall be lawful for each One of the said Universities to select One Person; and thereupon it shall be lawful for Her Majesty, with the Advice of Her Privy Council, to appoint One of the Persons so selected to be a Member of the said Council for the said Universities.

Provision in case the Universities of Glasgow, Aberdeen, and Saint Andrew's fail to appoint a Person to represent them.

VI. The Members chosen by the Medical Corporations and Universities of *England*, *Scotland*, and *Ireland* respectively, and the Members nominated by Her Majesty, with the Advice of Her Privy Council, for such Parts respectively of the United Kingdom, shall be the Branch Councils for such Parts respectively of the United Kingdom, to which Branch Councils shall be delegated such of the Powers and Duties vested in the Council as the Council may see fit other than the Power to make Representations to Her Majesty in Council as herein-after mentioned: The President shall be a Member of all the Branch Councils.

Branches of the Council for England, Scotland, and Ireland.

VII. Members of the General Council representing the Medical Corporations must be qualified to be registered under this Act.

Qualification.

VIII. The Members of the General Council shall be chosen and nominated for a Term not exceeding Five Years, and shall be capable of Re-appointment, and any Member may at any Time resign his appointment by Letter addressed to the President of the said Council, and upon the Death or Resignation of any Member of the said Council, some other Person shall be constituted a Member of the said Council in his place in manner herein-before provided; but it shall be lawful for the Council during such Vacancy to exercise the Powers herein-after mentioned.

Resignation or Death of Member of General Council.

IX. The General Council shall hold their first Meeting within Three Months from the Commencement of this Act, in such Place and at such Time as one of Her Majesty's Principal Secretaries of State shall appoint, and shall make such Rules and Regulations as to the Times and Places of the Meetings of the General Council, and the Mode of summoning the same, as to them shall seem expedient, which Rules and Regulations shall remain in force until altered at any subsequent Meeting; and in the Absence of

Time and Place of Meeting of the General Council.

any Rule or Regulation as to the summoning a Meeting of the General Council, it shall be lawful for the President to summon a Meeting at such Time and Place as to him shall seem expedient by Letter addressed to each Member; and at every Meeting, in the Absence of the President, some other Member to be chosen from the Members present shall act as President; and all Acts of the General Council shall be decided by the Votes of the Majority of the Members present at any Meeting, the whole Number present not being less than Eight, and at all such Meetings the President for the Time being shall, in addition to his Vote as a Member of the Council, have a Casting Vote, in case of an Equality of Votes; and the General Council shall have Power to appoint an Executive Committee out of their own Body, of which the Quorum shall not be less than Three, and to delegate to such Committee such of the Powers and Duties vested in the Council as the Council may see fit, other than the Power of making Representations to Her Majesty in Council as herein-after mentioned.

Appoint-
ment of
Registrars
and other
Officers.

X. The General Council shall appoint a Registrar, who shall act as Secretary of the General Council, and who may also act as Treasurer, unless the Council shall appoint another Person or other Persons as Treasurer or Treasurers; and the Person or Persons so appointed shall likewise act as Registrar for *England*, and as Secretary and Treasurer or Treasurers, as the Case may be, for the Branch Council for *England*; the General Council and Branch Council for *England* shall also appoint so many Clerks and Servants as shall be necessary for the Purposes of this Act; and every Person so appointed by any Council shall be removable at the Pleasure of that Council, and shall be paid such Salary as the Council by which he was appointed shall think fit.

Appoint-
ment of
Registrars
and other
Officers by
Branch
Councils.

XI. The Branch Councils for *Scotland* and *Ireland* shall each respectively in like Manner appoint a Registrar and other Officers and Clerks, who shall be paid such Salaries as such Branch Councils respectively shall think fit, and be removable at the pleasure of the Council by which they were appointed; and the Person appointed Registrar shall also act as Secretary to the Branch Council, and may also act as Treasurer, unless the Council shall appoint some other Person or Persons as Treasurer or Treasurers.

Fees for
Attend-
ance at
Councils.

XII. There shall be paid to the Members of the Councils such Fees for Attendance and such reasonable Travelling Expenses as shall from Time to Time be allowed by the General Council and approved by the Commissioners of Her Majesty's Treasury.

Expenses
of the
Councils.

XIII. All Monies payable to the respective Councils shall be paid to the Treasurers of such Councils respectively,

and shall be applied to defray the Expenses of carrying this Act into execution in manner following; that is to say, separate Accounts shall be kept of the Expenses of the General Council, and of those of the Branch Councils; and the Expenses of the General Council, including those of keeping, printing, and publishing the Register for the United Kingdom, shall be defrayed, under the Direction of the General Council, by means of an equal Per-centage Rate upon all Monies received by the several Branch Councils; Returns shall be made by the Treasurers of the respective Branch Councils, at such Times as the General Council shall direct, of all Monies received by them; and the necessary Per-centage having been computed by the General Council, the respective Contributions shall be paid by the Treasurers of such Branch Councils to the Treasurer or Treasurers of the General Council; and the Expenses of the Branch Councils shall be defrayed, under the Direction of those Councils respectively, out of the Residue of the Monies so received as aforesaid.

XIV. It shall be the Duty of the Registrars to keep their respective Registers correct in accordance with the Provisions of this Act, and the Orders and Regulations of the General Council, and to erase the Names of all registered Persons who shall have died, and shall from Time to Time make the necessary Alterations in the Addresses or Qualifications of the Persons registered under this Act; and to enable the respective Registrars duly to fulfil the Duties imposed upon them it shall be lawful for the Registrar to write a Letter to any registered Person, addressed to him according to his Address on the Register, to inquire whether he has ceased to practise or has changed his Residence, and if no Answer shall be returned to such Letter within the Period of Six Months from the sending of the Letter it shall be lawful to erase the Name of such Person from the Register; Provided always, that the same may be restored by Direction of the General Council should they think fit to make an Order to that Effect.

XV. Every Person now possessed, and (subject to the Provisions herein-after contained) every Person hereafter becoming possessed, of any One or more of the Qualifications described in the Schedule (A.) to this Act, shall, on Payment of a Fee, not exceeding Two Pounds, in respect of Qualifications obtained before the First Day of *January* One thousand eight hundred and fifty-nine, and not exceeding Five Pounds in respect of Qualifications obtained on or after that Day, be entitled to be registered on producing to the Registrar of the Branch Council for *England, Scotland, or Ireland* the Document conferring or evidencing the Quali-

Duty of Registrar to keep the Register correct.

Registration of Persons now qualified, and of Persons hereafter becoming qualified.

fication or each of the Qualifications in respect whereof he seeks to be so registered, or upon transmitting by Post to such Registrar Information of his Name and Address, and Evidence of the Qualification or Qualifications in respect whereof he seeks to be registered, and of the Time or Times at which the same was or were respectively obtained: Provided always, that it shall be lawful for the several Colleges and other Bodies mentioned in the said Schedule (A.) to transmit from Time to Time to the said Registrar Lists certified under their respective Seals of the several Persons who, in respect of Qualifications granted by such Colleges and Bodies respectively, are for the Time being entitled to be registered under this Act, stating the respective Qualifications and Places of Residence of such Persons; and it shall be lawful for the Registrar thereupon, and upon Payment of such Fee as aforesaid in respect of each Person to be registered, to enter in the Register the Persons mentioned in such Lists, with their Qualifications and Places of Residence as therein dated, without other Application in relation thereto.

Council to make Orders for regulating Registers to be kept.

XVI. The General Council shall, with all convenient Speed after the passing of this Act, and from Time to Time as Occasion may require, make Orders for regulating the Registers to be kept under this Act as nearly as conveniently may be in accordance with the Form set forth in Schedule (D.) to this Act, or to the like Effect.

Persons practising in England before 1st August 1815 entitled to be registered.

XVII. Any Person who was actually practising Medicine in *England* before the First Day of August One thousand eight hundred and fifteen shall, on Payment of a Fee to be fixed by the General Council, be entitled to be registered on producing to the Registrar of the Branch Council for *England, Scotland, or Ireland* a Declaration according to the Form in the Schedule (B.) to this Act signed by him, or upon transmitting to such Registrar Information of his Name and Address, and enclosing such Declaration as aforesaid.

Council may require Information as to Course of Study, &c., required for obtaining Qualifications.

XVIII. The several Colleges and Bodies in the United Kingdom mentioned in Schedule (A.) to this Act shall from Time to Time, when required by the General Council, furnish such Council with such Information as they may require as to the Courses of Study and Examinations to be gone through in order to obtain the respective Qualifications mentioned in Schedule (A.) to this Act, and the Ages at which such Courses of Study and Examination are required to be gone through, and such Qualifications are conferred, and generally as to the Requisites for obtaining such Qualifications; and any Member or Members of the General Council, or any Person or Persons deputed for this Purpose by such Council, or by any Branch Council, may attend and be present at any such Examinations.

XIX. Any Two or more of the Colleges and Bodies in the United Kingdom mentioned in Schedule (A.) to this Act may, with the Sanction and under the Directions of the General Council, unite or co-operate in conducting the Examinations required for Qualifications to be registered under this Act. Colleges may unite in conducting Examinations.

XX. In case it appear to the General Council that the Course of Study and Examinations to be gone through in order to obtain any such Qualification from any such College or Body are not such as to secure the Possession by Persons obtaining such Qualification of the requisite Knowledge and Skill for the efficient Practice of their Profession, it shall be lawful for such General Council to represent the same to Her Majesty's Most Honourable Privy Council. Defects in the Course of Study or Examinations may be represented by General Council to Privy Council.

XXI. It shall be lawful for the Privy Council, upon any such Representation as aforesaid, if it see fit, to order that any Qualification granted by such College or Body, after such Time as may be mentioned in the Order, shall not confer any Right to be registered under this Act: Provided always, that it shall be lawful for Her Majesty, with the Advice of Her Privy Council, when it is made to appear to Her, upon further Representation from the General Council or otherwise, that such College or Body has made effectual Provision, to the Satisfaction of such General Council, for the Improvement of such Course of Study or Examinations, or the Mode of conducting such Examinations, to revoke any such Order. Privy Council may suspend the Right of Registration in respect of Qualifications granted by College, &c., in default, but may be revoked.

XXII. After the Time mentioned in this Behalf in any such Order in Council no Person shall be entitled to be registered under this Act in respect of any such Qualification as in such Order mentioned, granted by the College or Body to which such Order relates, after the Time therein mentioned, and the Revocation of any such Order shall not entitle any Person to be registered in respect of any Qualification granted before such Revocation. Persons not to be Registered in respect of Qualifications granted by the College or Body before Revocation.

XXIII. In case it shall appear to the General Council that an Attempt has been made by any Body, entitled under this Act to grant Qualifications, to impose upon any Candidate offering himself for Examination an Obligation to adopt or refrain from adopting the Practice of any particular Theory of Medicine or Surgery, as a Test or Condition of admitting him to Examination or of granting a Certificate, it shall be lawful for the said Council to represent the same to Her Majesty's Most Honourable Privy Council, and the said Privy Council may thereupon issue an Injunction to such Body so acting, directing them to desist from such Practice; and in the event of their not complying there- Privy Council may prohibit Attempts to impose Restrictions as to any Theory of Medicine or Surgery by Bodies entitled to grant Certificates.

with, then to order that such Body shall cease to have the Power of conferring any Right to be registered under this Act so long as they shall continue such Practice.

As to the making and Authentication of Orders, &c.

XXIV. All Powers vested in the Privy Council by this Act may be exercised by any Three or more of the Lords and others of the Privy Council, the Vice-President of the Committee of the said Privy Council on Education being One of them; and all Orders and Acts of the Privy Council under this Act shall be sufficiently made and signified by a written or printed Document, signed by One of the Clerks of the Privy Council, or such Officer as may be appointed by the Privy Council in this Behalf; and all Orders and Acts made or signified by any written or printed Document purporting to be so signed shall be deemed to have been duly made, issued, and done by the Privy Council; and every such Document shall be received in Evidence in all Courts, and before all Justices and others, without Proof of the Authority or Signature of such Clerk or other Officer or other Proof whatsoever, until it be shown that such Document was not duly signed by the Authority of the Privy Council.

As to Registration by Branch Registrars.

XXV. Where any Person entitled to be registered under this Act applies to the Registrar of any of the said Branch Councils for that purpose, such Registrar shall forthwith enter in a Local Register in the Form set forth in Schedule (D.) to this Act, or to the like Effect, to be kept by him for that Purpose, the Name and Place of Residence, and the Qualification or several Qualifications in respect of which the Person is so entitled, and the Date of the Registration, and shall, in the Case of the Registrar of the Branch Council for *Scotland* or *Ireland*, with all convenient Speed send to the Registrar of the General Council a Copy, certified under the Hand of the Registrar, of the Entry so made, and the Registrar of the General Council shall forthwith cause the same to be entered in the General Register; and such Registrar shall also forthwith cause all Entries made in the Local Register for *England* to be entered in the General Register; and the Entry on the General Register shall bear date from the Local Register.

Evidence of Qualification to be given before Registration.

XXVI. No Qualification shall be entered on the Register, either on the first Registration or by way of Addition to a registered Name, unless the Registrar be satisfied by the proper Evidence that the Person claiming is entitled to it; and any Appeal from the Decision of the Registrar may be decided by the General Council, or by the Council for *England*, *Scotland*, or *Ireland* (as the Case may be); and any Entry which shall be proved to the Satisfaction of such General Council or Branch Council to have been fraudu-

lently or incorrectly made may be erased from the Register by Order in Writing of such General Council or Branch Council.

XXVII. The Registrar of the General Council shall in every Year cause to be printed, published, and sold, under the Direction of such Council, a correct Register of the Names in alphabetical Order according to the Surnames, with the respective Residences, in the Form set forth in Schedule (D.) to this Act, or to the like Effect, and Medical Titles, Diplomas, and Qualifications conferred by any Corporation or University, or by Doctorate of the Archbishop of *Canterbury*, with the Dates thereof, of all Persons appearing on the General Register as existing on the First Day of *January* in every Year; and such Register shall be called "The Medical Register;" and a Copy of the Medical Register for the Time being, purporting to be so printed and published as aforesaid, shall be Evidence in all Courts and before all Justices of the Peace and others that the Persons therein specified are registered according to the Provisions of this Act; and the Absence of the Name of any Person from such Copy shall be Evidence, until the contrary be made to appear, that such Person is not registered according to the Provisions of this Act: Provided always, that in the Case of any Person whose Name does not appear in such Copy, a certified Copy, under the Hand of the Registrar of the General Council or of any Branch Council, of the Entry of the Name of such Person on the General or Local Register shall be Evidence that such Person is registered under the Provisions of this Act.

XXVIII. If any of the said Colleges or the said Bodies at any Time exercise any Power they possess by Law of striking off from the List of such College or Body the Name of any One of their Members, such College or Body shall signify to the General Council the Name of the Member so struck off; and the General Council may, if they see fit, direct the Registrar to erase forthwith from the Register the Qualification derived from such College or Body in respect of which such Member was registered, and the Registrar shall note the same therein: Provided always, that the Name of no Person shall be erased from the Register on the Ground of his having adopted any Theory of Medicine or Surgery.

XXIX. If any registered Medical Practitioner shall be convicted in *England* or *Ireland* of any Felony or Misdemeanor, or in *Scotland* of any Crime or Offence, or shall after due Inquiry be judged by the General Council to have been guilty of infamous Conduct in any professional Respect, the General Council may, if they see fit, direct

Register
to be
published.

Names of
Members
struck off
from List
of College,
&c., to be
signified to
General
Council.

Medical
Practition-
ers con-
victed of
Felony
may be
struck off
the Regis-
ter.

the Registrar to erase the Name of such Medical Practitioner from the Register.

Registered Persons may have subsequent Qualifications inserted in the Register.

XXX. Every Person registered under this Act who may have obtained any higher Degree or any Qualification other than the Qualification in respect of which he may have been registered, shall be entitled to have such higher Degree or additional Qualification inserted in the Register in substitution for, or in addition to, the Qualification previously registered, on Payment of such Fee as the Council may appoint.

Privileges of registered Persons.

XXXI. Every Person registered under this Act shall be entitled according to his Qualification or Qualifications to practise Medicine or Surgery, or Medicine and Surgery, as the Case may be, in any Part of Her Majesty's Dominions, and to demand and recover in any Court of Law, with full Costs of Suit, reasonable Charges for professional Aid, Advice, and Visits, and the Cost of any Medicines or other Medical or Surgical Appliances rendered or supplied by him to his Patients: Provided always, that it shall be lawful for any College of Physicians to pass a Byelaw to the effect that no one of their Fellows or Members shall be entitled to sue in manner aforesaid in any Court of Law, and thereupon such Byelaw may be pleaded in bar to any Action for the Purposes aforesaid commenced by any Fellow or Member of such College.

None but registered Persons to recover Charges.

XXXII. After the First Day of *January* One thousand eight hundred and fifty-nine, no Person shall be entitled to recover any Charge in any Court of Law for any Medical or Surgical Advice, Attendance, or for the Performance of any Operation, or for any Medicine which he shall have both prescribed and supplied, unless he shall prove upon the Trial that he is registered under this Act.

Poor Law Medical Officers not disqualified if registered within Six Months of passing of Act.

XXXIII. Provided also, That no Person who on the First of *October* One thousand eight hundred and fifty-eight shall be acting as Medical Officer under an Order of the Poor Law Commissioners or Poor Law Board shall be disqualified to hold such Office by reason of his not being registered as herein required, unless he shall have failed to be registered within Six Months from the passing of this Act.

Meaning of Terms "legally qualified Medical Practitioner," &c.

XXXIV. After the First Day of *January* One thousand eight hundred and fifty-nine, the Word "legally qualified Medical Practitioner" or "duly qualified Medical Practitioner," or any Words importing a Person recognised by Law as a Medical Practitioner or Member of the Medical Profession, when used in any Act of Parliament, shall be construed to mean a Person registered under this Act.

Registered

XXXV. Every Person who shall be registered under

the Provisions of this Act shall be exempt, if he shall so ^{Persons} desire, from serving on all Juries and Inquests whatsoever, ^{exempted} and from serving all corporate, parochial, Ward, Hundred, ^{from serv-} and Township Offices, and from serving in the Militia, and ^{ing on} the Name of such Person shall not be returned in any List ^{Juries, &c.} of Persons liable to serve in the Militia, or in any such Office as aforesaid.

XXXVI. After the First Day of *January* One Thou- ^{Unregis-} sand eight hundred and fifty-nine, no Person shall hold any ^{tered Per-} Appointment as a Physician, Surgeon, or other Medical ^{sons not to} Officer either in the Military or Naval Service, or in Emi- ^{hold cer-} grant or other Vessels, or in any Hospital, Infirmary, Dis- ^{tain Ap-} pensary, or Lying-in Hospital, not supported wholly by ^{point-} voluntary Contributions, or in any Lunatic Asylum, Gaol, ^{ments.} Penitentiary, House of Correction, House of Industry, Parochial or Union Workhouse or Poorhouse, Parish Union, or other Public Establishment, Body, or Institution, or to any Friendly or other Society for affording mutual Relief in Sickness, Infirmary, or old Age, or as a Medical Officer of Health, unless he be registered under this Act: Provided always, that nothing in this Act contained shall extend to repeal or alter any of the Provisions of the *Passengers Act, 1855.*

XXXVII. After the First Day of *January* One thou- ^{No Certi-} sand eight hundred and fifty-nine, no Certificate required ^{ficat to be} by any Act now in force, or that may hereafter be passed ^{valid un-} from any Physician, Surgeon, Licentiate in Medicine and ^{less Per-} Surgery, or other Medical Practitioner, shall be valid unless ^{son sign-} the Person signing the same be registered under this Act. ^{ing be}

XXXVIII. Any Registrar who shall wilfully make or ^{Penalty on} cause to be made any Falsification in any Matters relating ^{wilful Fal-} to the Register shall be deemed guilty of a Misdemeanor in ^{sification} *England or Ireland*, and in *Scotland* of a Crime or Offence ^{of Regis-} punishable by Fine or Imprisonment, and shall, on Con- ^{ter.} viction thereof, be imprisoned for any Term not exceeding Twelve Months.

XXXIX. If any Person shall wilfully procure or at- ^{Penalty for} tempt to procure himself to be registered under this Act, ^{obtaining} by making or producing or causing to be made or produced ^{Registra-} any false or fraudulent Representation or Declaration, either ^{tion by} verbally or in Writing, every such Person so offending, ^{false Re-} and every Person aiding and assisting him therein, shall be ^{presenta-} deemed guilty of a Misdemeanor in *England and Ireland*, ^{tions.} and in *Scotland* of a Crime or Offence punishable by Fine or Imprisonment, and shall, on Conviction thereof, be sentenced to be imprisoned for any Term not exceeding Twelve Months.

XL. Any Person who shall wilfully and falsely pretend ^{Penalty for}

falsely pre-
tending to
be a re-
gistered
Person.

to be or take or use the Name or Title of a Physician, Doctor of Medicine, Licentiate in Medicine and Surgery, Bachelor of Medicine, Surgeon, General Practitioner or Apothecary, or any Name, Title, Addition, or Description implying that he is registered under this Act, or that he is recognized by Law as a Physician, or Surgeon, or Licentiate in Medicine and Surgery, or a Practitioner in Medicine, or an Apothecary, shall, upon a summary Conviction for any such Offence, pay a Sum not exceeding Twenty Pounds.

Recovery
of Penalties.

XLI. Any Penalty to which under this Act any Person is liable on Summary Conviction of any Offence may be recovered as follows; (that is to say,) in *England*, in manner directed by the Act of the Session holden in the Eleventh and Twelfth Years of Her Majesty, Chapter Forty-three, and in *Ireland* in manner directed by "The Petty Sessions (*Ireland*) Act, 1851," or any other Act for the Time being in force in *England* and *Ireland* respectively for the like Purposes; and any such Penalty may in *Scotland* be recovered by the Procurator Fiscal of the County, or by any other Person before the Sheriff or Two Justices, who may proceed in a summary Way and grant Warrant for bringing the Party complained against before him or them, or issue an Order requiring such Party to appear on a Day and at a Time and Place to be named in such Order, and every such Order shall be served on the Party by delivering to him in Person or by leaving at his usual Place of Abode a Copy of such Order and of the Complaint whereupon the same has proceeded, and upon the Appearance or Default to appear of the Party, it shall be lawful for the Sheriff or Justices to proceed to the hearing of the Complaint, and upon Proof on Oath or Confession of the Offence, the Sheriff or Justices shall without any written Pleadings or Record of Evidence commit the Offender and decern him to pay the Penalty named as well as such Expenses as the Sheriff or Justices shall think fit, and failing Payment shall grant Warrant for Recovery thereof by Poinding and Imprisonment, such Imprisonment to be for such Period as the Discretion of the Sheriff or Justices may direct, not exceeding Three Calendar Months, and to cease on Payment of the Penalty and Expenses.

Applica-
tion of
Penalties.

XLII. Any Sum or Sums of Money arising from Conviction and Recovery of Penalties as aforesaid shall be paid to the Treasurer of the General Council.

Applica-
tion of
Monies re-
ceived by
Treasurer.

XLIII. All Monies received by any Treasurer arising from Fees to be paid on Registration, from the Sale of Registers, from Penalties, or otherwise, shall be applied for Expenses of Registration and of the Execution of this Act.

XLIV. The Treasurers of the General and Branch Councils shall enter in Books to be kept for that Purpose a true Account of all Sums of Money by them received and paid, and such Accounts shall be submitted by them to the respective General Council and Branch Councils at such Times as the Councils shall require; and the said Accounts shall be published annually, and such Accounts shall be laid before both Houses in the Month of *March* in every Year, if Parliament be sitting, or, if Parliament be not sitting, then within One Month after the next Meeting of Parliament.

XLV. Every Registrar of Deaths in the United Kingdom on receiving Notice of the Death of any Medical Practitioner shall forthwith transmit by Post to the Registrar of the General Council and to the Registrar of the Branch Council a Certificate under his own Hand of such Death, with the Particulars of Time and Place of Death, and may charge the Cost of such Certificate and Transmission as an Expense of his Office, and on the Receipt of such Certificate the Medical Registrar shall erase the Name of such deceased Medical Practitioner from the Register.

XLVI. It shall be lawful for the General Council by Special Orders to dispense with such Provisions of this Act or with such Part of any Regulations made by its Authority as to them shall seem fit, in favour of Persons now practising Medicine or Surgery in any Part of Her Majesty's Dominions other than *Great Britain* and *Ireland* by virtue of any of the Qualifications described in Schedule (A.); and also in favour of Persons practising Medicine or Surgery within the United Kingdom on foreign or colonial Diplomas or Degrees before the passing of this Act; and also in favour of any Persons who have held Appointments as Surgeons or Assistant Surgeons in the Army, Navy, or Militia, or in the Service of the *East India Company*, or are acting as Surgeons in the public Service, or in the Service of any Charitable Institutions, and also, so far as to the Council shall seem expedient, in favour of Medical Students who shall have commenced their professional Studies before the passing of this Act.

XLVII. It shall be lawful for Her Majesty to grant the Corporation of the Royal College of Physicians of *London* a new Charter, and thereby to give to such Corporation the Name of "The Royal College of Physicians of *England*," and to make such Alterations in the Constitution of the same Corporation as to Her Majesty may seem expedient; and it shall be lawful for the said Corporation to accept such Charter under their Common Seal, and such Acceptance shall operate as a Surrender of all Charters

heretofore granted to the said Corporation, except the Charter granted by King *Henry* the Eighth, and shall also operate as a Surrender of such Charter and of any Rights, Powers, or Privileges conferred by or enjoyed under an Act of the Session holden in the Fourteenth and Fifteenth Years of King *Henry* the Eighth, Chapter Five, confirming the same, as far as such Charter and Act respectively may be inconsistent with such new Charter: Provided nevertheless, that within Twelve Months after the granting of such Charter to the College of Physicians of *London*, any Fellow, Member, or Licentiate of the Royal College of Physicians of *Edinburgh*, or of the Queen's College of Physicians of *Ireland*, who may be in practice as a Physician in any Part of the United Kingdom called *England* and who may be desirous of becoming a Member of such College of Physicians of *England*, shall be at liberty to do so, and be entitled to receive the Diploma of the said College, and to be admitted to all the Rights and Privileges thereunto appertaining, on the Payment of a Registration Fee of Two Pounds to the said College.

Her Majesty may grant Power to College of Surgeons to institute Examinations, &c. for Dentists.

XLVIII. It shall, notwithstanding anything herein contained, be lawful for Her Majesty, by Charter, to grant to the Royal College of Surgeons of *England* Power to institute and hold Examinations for the Purpose of testing the Fitness of Persons to practise as Dentists, who may be desirous of being so examined, and to grant Certificates of such Fitness.

New Charter may be granted to College of Physicians of *Edinburgh*.

XLIX. It shall be lawful for Her Majesty to grant to the Corporation of the Royal College of Physicians of *Edinburgh* a new Charter, and thereby to give to the said College of Physicians the Name of "The Royal College of Physicians of *Scotland*," and it shall be lawful for the said Royal College of Physicians, under their Common Seal, to accept such new Charter, and such Acceptance shall operate as a Surrender of all Charters heretofore granted to the said Corporation.

The Faculty at Glasgow may be amalgamated.

L. If at any future Period the Royal College of Surgeons of *Edinburgh* and Faculty of Physicians and Surgeons of *Glasgow* agree to amalgamate, so as to form One United Corporation, under the Name of "The Royal College of Surgeons of *Scotland*," it shall be lawful for Her Majesty to grant, and for such College and Faculty under their respective Common Seals to accept, such new Charter or Charters as may be necessary for effecting such Union, and such Acceptance shall operate as a Surrender of all Charters heretofore granted to such College and Faculty; and in the event of such Union it shall be competent for the said College and Faculty to make such Arrangements as to the

Time and Place of their Examinations as they may agree upon, these Arrangements being in conformity with the Provisions of this Act, and subject to the Approval of the General Council.

LI. It shall be lawful for Her Majesty to grant to the Corporation of the King and Queen's College of Physicians in *Ireland* a new Charter, and thereby to give to such Corporation the Name of "The Royal College of Physicians of *Ireland*," and to make such Alterations in the Constitution of the said Corporation as to Her Majesty may seem expedient; and it shall be lawful for the said Corporation to accept such Charter under their Common Seal, and such Acceptance shall operate as a Surrender of the Charter granted by King *William* and Queen *Mary*, so far as it may be inconsistent with such new Charter.

New Charter may be granted to the King and Queen's College of Physicians in *Ireland*.

LII. Provided always, That nothing herein contained shall extend to authorize Her Majesty to create any new Restriction in the Practice of Medicine or Surgery, or to grant to any of the said Corporations any Powers or Privileges contrary to the Common Law of the Land or to the Provisions of this Act, and that no such new Charter shall in anywise prejudice, affect, or annul any of the existing Statutes or Byelaws of the Corporations to which the same shall be granted, further than shall be necessary for giving full Effect to the Alterations which shall be intended to be effected by such new Charters and by this Act in the Constitution of such Corporation.

Charters not to contain new Restrictions in the Practice of Medicine or Surgery.

LIII. The Enactments and Provisions of the University of *London* Medical Graduates Act, 1854, shall be deemed and construed to have applied and shall apply to the University of *London* for the Time being, notwithstanding the Surrender or Determination of the therein-recited Charter, and the granting or Acceptance of the now existing Charter of the University of *London*, or the future Determination of the present or any future Charter of the said University, and the granting of any new Charter to the said University; and that every Bachelor of Medicine and Doctor of Medicine of the University of *London* for the Time being shall be deemed to have been and to be entitled and shall be entitled to the Privileges conferred by the said Act, in the same Manner and to the same Extent as if the Charter recited in the said Act remained in force, subject nevertheless to the Provisions of this Act.

Provisions of 17 & 18 Vict. c. 114. as to University of *London* to continue in force.

LIV. The General Council shall cause to be published under their Direction a Book containing a List of Medicines and compounds, and the Manner of preparing them, together with the true Weights and Measures by which they

British Pharmacopœia to be published.

are to be prepared and mixed, and containing such other Matter and Things relating thereto as the General Council shall think fit, to be called "British Pharmacopœia;" and the General Council shall cause to be altered, amended, and republished such Pharmacopœia as often as they shall deem it necessary.

Chemists,
&c. not to
be affected.

LV. Nothing in this Act contained shall extend or be construed to extend to prejudice or in any way to affect the lawful Occupation, Trade, or Business of Chemists and Druggists and Dentists, or the Rights, Privileges, or Employment of duly licensed Apothecaries in *Ireland*, so far as the same extend to selling, compounding, or dispensing Medicines.

SCHEDULE (A.)

1. Fellow, Licentiate, or Extra Licentiate of the Royal College of Physicians of London.

2. Fellow or Licentiate of the Royal College of Physicians of Edinburgh.

3. Fellow or Licentiate of the King's and Queen's College of Physicians of Ireland.

4. Fellow or Member or Licentiate in Midwifery of the Royal College of Surgeons of England.

5. Fellow or Licentiate of the Royal College of Surgeons of Edinburgh.

6. Fellow or Licentiate of the Faculty of Physicians and Surgeons of Glasgow.

7. Fellow or Licentiate of the Royal College of Surgeons in Ireland.

8. Licentiate of the Society of Apothecaries, London.

9. Licentiate of the Apothecaries Hall, Dublin.

10. Doctor, or Bachelor, or Licentiate of Medicine, or Master in Surgery of any University of the United Kingdom; or Doctor of Medicine by Doctorate granted prior to passing of this Act by the Archbishop of Canterbury.

11. Doctor of Medicine of any Foreign or Colonial University or College, practising as a Physician in the United Kingdom before the First Day of October 1858, who shall produce Certificates to the Satisfaction of the Council of his having taken his Degree of Doctor of Medicine after Regular Examination, or who shall satisfy the Council, under Section Forty-five of this Act, that there is sufficient reason for admitting him to be registered.

SCHEDULE (B.)

DECLARATION required of a Person who claims to be registered as a Medical Practitioner, upon the Ground that he was in prac-

tice as a Medical Practitioner in England or Wales before the First Day of August 1815 :

To the Registrar of the Medical Council.

I, _____ residing at _____ in the County of _____
hereby declare that I was practising as a Medical
Practitioner at _____ in the County
of _____ before the First Day of August 1815.

(Signed) [Name.]
Dated this _____ Day of _____ 185 .

SCHEDULE (D.)

Name.	Residence.	Qualification.	Title.
A.B.	London .	Fellow of the Royal College of Physicians of	
C.D.	Edinburgh	Fellow and Member of the Royal College of Surgeons of	
E.F.	Dublin .	Graduate in Medicine of University of	
G.H.	Bristol . .	Licentiate of the Society of Apothecaries.	
I.K.	London .	Member of College of Surgeons and Licentiate of the Society of Apothecaries.	

CAP. XCI.

An Act to enable Joint Stock Banking Companies to be formed on the Principle of Limited Liability.—[2d August 1858.]

WHEREAS it is expedient to enable Banking Companies to be formed on the Principle of Limited Liability : Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. So much of the Joint Stock Banking Companies Act, ^{So much of 20 & 21 Vict.} 1857, as prohibits a Banking Company from being formed under that Act with limited Liability, or prohibits an ex-c. 49. as

prohibits
Banking
Companies
from being
registered
with
Limited
Liability
repealed.
Proviso
as to
Bankers
issuing
Notes.

isting Banking Company from being registered under that Act with limited Liability, shall be repealed, subject to the following Proviso, that no Banking Company claiming to issue Notes in the United Kingdom shall be entitled to limited Liability in respect of such Issue, but shall continue subject to unlimited Liability in respect thereof, and that, if necessary, the Assets shall be marshalled for the Benefit of the General Creditors, and the Shareholders shall be liable for the whole Amount of the Issue, in addition to the Sum for which they would be liable as Shareholders of a Limited Company.

Registra-
tion of
Banking
Companies
not to
prejudice
Re-regis-
tration as
limited.
On Re-
registra-
tion with
limited
Liability
Notice to
be given
to Custom-
ers.

II. The Registration of a Banking Company under the Joint Stock Banking Companies Act, 1857, or under any other Act, shall not prejudice the Right of such Company to register itself again as a Limited Company under the said Joint Stock Banking Companies Act, 1857, and the Acts incorporated therewith.

In default
of Notice
unlimited
Liability
to con-
tinue as
to such
Custom-
ers.

III. Provided, That every Company so registering itself again as a Limited Company, and every existing Banking Company which shall register itself as a Limited Banking Company, shall, at least Thirty Days previous to obtaining a Certificate of Registration with Limited Liability, give Notice that it is intended so to register the same to every Person and Partnership Firm who shall have a Banking Account with the Company, and such Notice shall be given either by delivering the same to such Person or Firm, or leaving the same or putting the same into the Post addressed to him or them at such Address as shall have been last communicated or otherwise become known as his or their Address to or by the Company; and in case the Company shall omit to give any such Notice as is herein-before required to be given, then as between the Company and the Person or Persons only who are for the Time being interested in the Account in respect of which such Notice ought to have been given, and so far as respects such Account and all Variations thereof down to the Time at which such Notice shall be given, but not further or otherwise, the Certificate of Registration with limited Liability shall have no operation.

Banking
Company
to annex a
Statement
to their
Memoran-
dum of As-
sociation.

IV. Every Limited Joint Stock Banking Company shall, before it commences Business, or, if a Banking Company at the Time carrying on Business with unlimited Liability, before it avails itself of the Provisions of this Act, and also on the First Day of *February* and First Day of *August* in every Year during which it carries on Business, make a Statement in the Form contained in the Schedule hereto, or as near thereto as Circumstances will Admit, and a Copy of such Statement shall be put up in a conspicuous Place in

the registered Office of the Company, and in every Branch Office or Place where the Banking Business of the Company is carried on ; and if Default is made in due Compliance with the Provisions of this Section, each Director shall be liable to a Penalty not exceeding Five Pounds for every Day during which such Default continues, and such Penalties shall be recovered in a summary Manner.

V. Limited Joint Stock Banking Companies shall be wound up in the same Manner and under the same Jurisdiction as that in and under which Joint Stock Banking Companies other than Limited are required to be wound up by the Joint Stock Banking Companies Act, 1857. How Limited Banking Companies are to be wound up.

SCHEDULE referred to in the foregoing Act.

Form of Statement to be published by a Limited Joint Stock Banking Company.

The Liability of the Shareholders is limited.

The Capital of the Company is One million, divided into Ten thousand Shares of One hundred Pounds each.

The Number of Shares issued is Ten thousand.

Calls to the Amount of Twenty Pounds per Share have been made, under which the Sum of One hundred and eighty thousand Pounds has been received.

The Liabilities of the Company on the First Day of

January (or July) were— £ s. d.

Notes issued	.	.	.	.
Deposits not bearing Interest	.	.	.	.
Deposits bearing Interest	.	.	.	.
Seven Day and other Bills	.	.	.	.
Total				<hr/>

The Assets of the Company on that Day were—

Government Securities	.	.	.	.
Bills of Exchange	.	.	.	.
Loans on Mortgage	.	.	.	.
Other Loans	.	.	.	.
Bank Premises	.	.	.	.
Other Securities, exclusive of unpaid Calls on Shares	.	.	.	.
Total				<hr/>

Dated the First Day of February or August One thousand eight hundred and fifty-nine.

CAP. XCIII.

An Act to enable Persons to establish Legitimacy and the Validity of Marriages, and the Right to be deemed natural-born Subjects.—[2d August 1858.]

WHEREAS it is expedient to enable Persons to establish their Legitimacy, and the Marriage of their Parents and others from whom they may be descended, and also to enable Persons to establish their Right to be deemed natural-born Subjects: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Applica-
tion to
Court for
Divorce
and Matri-
monial
Causes for
Declara-
tion of Le-
gitimacy
or Validity
or Invali-
dity of
Marriage.

I. Any natural-born Subject of the Queen, or any Person whose Right to be deemed a natural-born Subject depends wholly or in part on his Legitimacy or on the Validity of a Marriage, being domiciled in *England* or *Ireland*, or claiming any Real or Personal Estate situate in *England*, may apply by Petition to the Court for Divorce and Matrimonial Causes, praying the Court for a Decree declaring that the Petitioner is the legitimate Child of his Parents, and that the Marriage of his Father and Mother, or of his Grandfather and Grandmother, was a valid Marriage, or for a Decree declaring either of the Matters aforesaid; and any such Subject or Person, being so domiciled or claiming as aforesaid, may in like Manner apply to such Court for a Decree declaring that his Marriage was or is a valid Marriage, and such Court shall have Jurisdiction to hear and determine such Application and to make such Decree declaratory of the Legitimacy or Illegitimacy of such Person, or of the Validity or Invalidity of such Marriage, as to the Court may seem just; and such Decree, except as herein-after mentioned, shall be binding to all Intents and Purposes on Her Majesty and on all Persons whomsoever.

Applica-
tion to
Court for
Declara-
tion of
Right to
be deemed
a natural-
born Sub-
ject.

II. Any Person, being so domiciled or claiming as aforesaid, may apply by Petition to the said Court for a Decree declaratory of his Right to be deemed a natural-born Subject of Her Majesty, and the said Court shall have Jurisdiction to hear and determine such Application, and to make such Decree thereon as to the Court may seem just, and where such Application as last aforesaid is made by the Person making such Application as herein mentioned for a Decree declaring his Legitimacy or the Validity of a Marriage, both Applications may be included in the same Petition; and every Decree made by the said Court shall,

except as herein-after mentioned, be valid and binding to all Intents and Purposes upon Her Majesty and all Persons whomsoever.

III. Every Petition under this Act shall be accompanied by such Affidavit verifying the same, and of the Absence of Collusion, as the Court may by any General Rule direct.

Petition to be accompanied by Affidavit.

IV. All the Provisions of the Act of the last Session, Chapter Eighty-five, so far as the same may be applicable, and the Powers and Provisions therein contained in relation to the making and laying before Parliament of Rules and Regulations concerning the Practice and Procedure under that Act, and fixing the Fees payable upon Proceedings before the Court, shall extend to Applications and Proceedings in the said Court under this Act, as if the same had been authorized by the said Act of the last Session.

20 & 21 Vict. c. 85. to apply to Proceedings under this Act.

V. In all Proceedings under this Act the Court shall have full Power to award and enforce Payment of Costs to any Persons cited, whether such Persons shall or shall not oppose the Declaration applied for, in case the said Court shall deem it reasonable that such Costs shall be paid.

Power to award and enforce Payment of Costs.

VI. A Copy of every Petition under this Act, and of the Affidavit accompanying the same, shall, One Month at least previously to the Presentation or filing of such Petition, be delivered to Her Majesty's Attorney General, who shall be a Respondent upon the Hearing of such Petition and upon every subsequent Proceeding relating thereto.

Attorney General to have a Copy of Petition One Month before it is filed, and to be Respondent.

VII. Where any Application is made under this Act to the said Court such Person or Persons (if any) besides the said Attorney General as the Court shall think fit shall, subject to the Rules made under this Act, be cited to see Proceedings or otherwise summoned in such Manner as the Court shall direct, and may be permitted to become Parties to the Proceedings, and oppose the Application.

Court may require Persons to be cited.

VIII. The Decree of the said Court shall not in any Case prejudice any Person, unless such Person has been cited or made a Party to the Proceedings or is the Heir-at-Law or next of Kin, or other Real or Personal Representative of or derives Title under or through a Person so cited or made a Party; nor shall such Sentence or Decree of the Court prejudice any Person if subsequently proved to have been obtained by Fraud or Collusion.

Saving for Rights of Persons not cited.

IX. Any Person domiciled in *Scotland*, or claiming any Heritable or Moveable Property situate in *Scotland*, may raise and insist, in an Action of Declarator before the Court of Session, for the Purpose of having it found and declared that he is entitled to be deemed a Natural-born Subject of Her Majesty; and the said Court shall have Jurisdiction to hear and determine such Action of Declarator, in the

Persons domiciled in Scotland may insist, on an Action of Declarator, that he is a

natural-born Subject.

No Proceedings to affect final Judgments, &c. already pronounced.

Acts to be read together. Short Title.

same Manner and to the same Effect, and with the same Power to award Expenses, as they have in Declarators of Legitimacy and Declarators of Bastardy.

X. No Proceeding to be had under this Act shall affect any final Judgment or Decree already pronounced or made by any Court of competent Jurisdiction.

XI. The said Act of the last Session and this Act shall be construed together as One Act; and this Act may be cited for all Purposes as "The Legitimacy Declaration Act, 1858."

CAP. CI.

An Act to amend the Act of the Eighteenth and Nineteenth Years of Her present Majesty, Chapter Sixty-three, relating to Friendly Societies.—[2d August 1858.]

18 & 19
Vict. c. 63.

WHEREAS it is expedient to amend an Act passed in the Session holden in the Eighteenth and Nineteenth Years of Her Majesty, Chapter Sixty-three, intituled *An Act to consolidate and amend the Law relating to Friendly Societies*, and to provide additional Facilities for carrying the same into effect: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

Jurisdiction of County Court given to Judge of Sheriff's Court, Assistant Barrister, &c., and Section 24 extended to Ireland.

I. In the City of *London* the Judge of the Sheriff's Court, and in *Ireland* the Assistant Barrister within his District, and in the Cities of *Dublin* and *Cork* the Recorder thereof, shall respectively have the same Jurisdiction as by the said Act, as amended by this Act, is given to the Judge of a County Court in any matter arising under the said Act, and in *Ireland* a Justice of the Peace or Two Justices of the Peace, as the Case may be, shall have the same Jurisdiction as by Section Twenty-four of the said Act is given to a Justice of the Peace or Two Justices of the Peace in *England* in any Matter arising under the said Section, but the Complaint shall be heard and determined in manner directed by the Act passed in the Fourteenth and Fifteenth Years of Her Majesty, Chapter Ninety-three.

No money to be paid on the Death of a Child without a Certificate

II. The Tenth Section of the said Act shall be repealed, and instead thereof be it enacted:

In any Society in which a Sum of Money may be insured, payable on the Death of a Child under the Age of Ten Years, for the Funeral Expenses of such Child, it shall

not be lawful to pay any Sum so insured unless the Person who shall apply for such Payment shall produce a Certificate, signed by a qualified Medical Practitioner, stating the probable Cause of Death of such Child; and if any Trustee or Officer of such Society, upon an Insurance of a Sum payable on the Death of any Child under the Age of Ten Years, shall knowingly pay a Sum which shall raise the whole Amount receivable from One or more than One Society for the Funeral Expenses of a Child under the Age of Five Years to a Sum exceeding Six Pounds, or of a Child between the Ages of Five and Ten Years to a Sum exceeding Ten Pounds, or shall pay any Sum without endorsing the Amount thereof on the Back or at the Foot of the Medical Certificate aforesaid, or if any Parent or other Person, who shall apply for such Payment to more than One Society, shall produce to the Trustees or Officers of One Society any other or different Certificate than that which he shall have produced to the Trustees or Officers of any other Society, such Trustee, Officer, Parent, or other Person shall be liable to a Penalty not exceeding Five Pounds for every such Act upon Conviction before Two Justices of the County or Borough in which such Child shall have died; Provided, that if the said Child shall have been attended immediately before its Death by the Medical Officer of any Union on account of such Union, he shall deliver to the Parents or Friends of the deceased Child, upon their Application, a Certificate stating the probable Cause of Death of such Child, and shall not be entitled to receive any Fee for the same; and if such Child shall not have been attended by such Medical Officer as aforesaid, nor by any qualified Medical Practitioner, the Medical Officer of the Union or Parish in which such Child shall have been resident shall deliver to the Parents or Friends of the deceased Child, upon their application, a Certificate stating the probable Cause of Death of such Child, and shall be entitled to receive from the Parties applying for the same a Fee of One Shilling.

III. Sections Sixteen and Twenty-four of the said Act shall extend and be applicable to all Institutions and Societies entitled to the Benefit of Section Eleven of the said Act.

IV. Any Friendly Society may, with the Approval in Writing of the Registrar, change its Name; but no such Change shall affect any Rights or Obligations of the Society or any Member thereof, and any legal Proceedings may be continued or commenced by or against the Trustees of the Society, or any Officer or the Committee thereof, by and notwithstanding its new Name.

V. The Proviso contained in Section Forty of the said Act

signed by
a Medical
Practitioner.

Extension
of Provi-
sions of re-
cited Act
as to Pun-
ishment of
Fraud, &c.
Power to
Society to
change its
name.

be settled
by Jus-
tices, if
Rules so
direct.

Act shall be repealed, and in lieu thereof be it enacted, That where the Rules of any Society established under the said Act, or any of the Acts thereby repealed, shall direct Disputes to be referred to Justices, then any Justice of the Peace acting in the County or Borough in which the Place of Business of such Society shall be situated, upon Complaint made by any Member, his Executors, Administrators, Nominee, or Assigns, or by any Person claiming under the Rules of the Society, of any Matter in dispute between him or them and the Society, to summon the Person against whom such Complaint is made to appear at a Time and Place to be named in such Summons, and any Two Justices present at the Time and Place mentioned in such Summons shall proceed to hear and determine the said Complaint, which Complaint shall be heard and determined in *England* in manner directed by the Act passed in the Eleventh and Twelfth Years of Her Majesty, Chapter Forty-three, and in *Ireland* in manner directed by the Act passed in the Fourteenth and Fifteenth of Her Majesty, Chapter Ninety-three; and such Justices may make such Order thereupon, either for the Payment of Money or otherwise, together with Costs, not exceeding Ten Shillings, as they shall think fit; and where the Order made shall be for the doing of some Act other than the Payment of Money, the said Justices may order the Payment of a Sum of Money in default of the doing of such Act; and any Monies which shall be paid by any Officer of the Society so levied on his Property under any Order or Warrant of the Justices shall be repaid, with all Damages accruing to him, by the Society: Provided always, that in *Scotland* the Sheriff within his County shall have the same Jurisdiction as is hereby given to a Justice or Justices of the Peace.

Justices
may make
Order.

Sheriff in
Scotland to
have same
Jurisdic-
tion as
Justices.

Sects. 40
and 44 of
said Act
extended
to other
Disputes.

VI. Sections Forty and Forty-four of the said Act shall extend and be applicable to Disputes between the Executors, Administrators, Nominee, or Assigns of a Member, and the Trustees, Treasurer, or other Officer, or the Committee of a Society.

An Officer
to be pro-
ceeded
against on
behalf of a
Society.

VII. In any Proceeding under the said recited Act or this Act against a Society it shall be sufficient to make the Secretary or other Officer of the Society, at the Time of the Plaint or Complaint being entered or made, the Defendant in such Proceeding, by his Name and the Title of the Office he holds in the Society; and the Proceedings on such Plaint or Complaint shall be commenced and carried on against such Officer on behalf of the Society, and shall not be abated or prejudiced by the Death, Resignation, or Removal, or by any Act of such Officer after the Commencement thereof; and the Summons to be issued to such

Officer may be served by leaving the same at the usual Place of Business of the Society.

VIII. Instead of its being necessary to state in the Agreement for the Dissolution of a Friendly Society pursuant to the said recited Act the intended Appropriation or Division of the Funds or Property thereof, such Appropriation or Division may by such Agreement be referred to the Award of the Registrar of Friendly Societies, or to the Actuary to the Commissioners for the Reduction of the National Debt, or to an Actuary of some Life Assurance Company established in *London, Edinburgh, or Dublin*, who shall have exercised the Profession of Actuary for at least Five Years, to be named in the said Agreement; and also, that on the Application in Writing of not less than One Fourth Part of the Members of any Friendly Society made to the Registrar or Actuary aforesaid, stating that the Funds of the said Society are insufficient to meet the Claims thereon, with the Grounds thereof, it shall be lawful for the Registrar or Actuary aforesaid to investigate the same, and to determine whether the said Society should continue or be dissolved, and the Funds and Property divided; and if in his opinion the said Society should be dissolved, then to make an Award to that effect, and to award, without the Requirement of Section Thirteen of the said Act being complied with, in what Way the Funds and Property should be appropriated and divided; and that the Award of the said Registrar or Actuary in either of the said Cases shall be final and conclusive on all the Members and other Persons interested in or having any Claim on the Funds of the said Society, without Appeal, and shall be enforced in the same Manner as by Section Forty-one of the said Act is provided for enforcing the Decision of Arbitrators; and that the Expenses incurred by the said Registrar, or the Charges of the said Actuary, shall be paid out of the Funds and Property of the said Society before any Appropriation or Division thereof shall be made.

IX. This Act and the said recited Act shall be construed as One Act, and may be cited together for all Purposes as the "Friendly Societies Acts, 1855 and 1858."

CAP. CII.

An Act to indemnify certain Persons who have formed a voluntary Association for the Disposal of Works of Utility and Ornament by Chance or otherwise as Prizes.—[2d August 1858.]

WHEREAS an Act was passed in the Eighth Year of Her

7 and 8
Vict. c.
109.

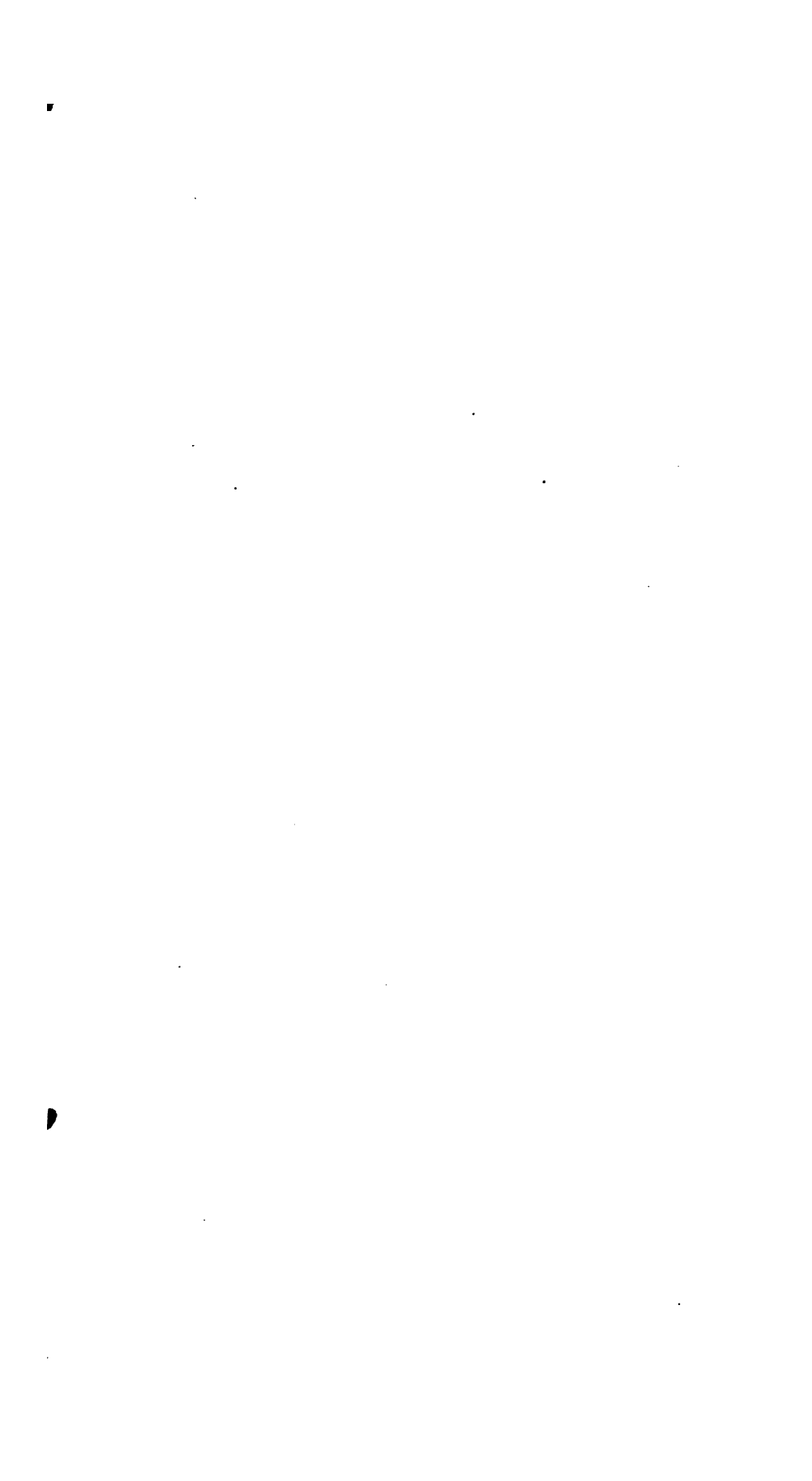
8 and 9
Vict. c. 57.

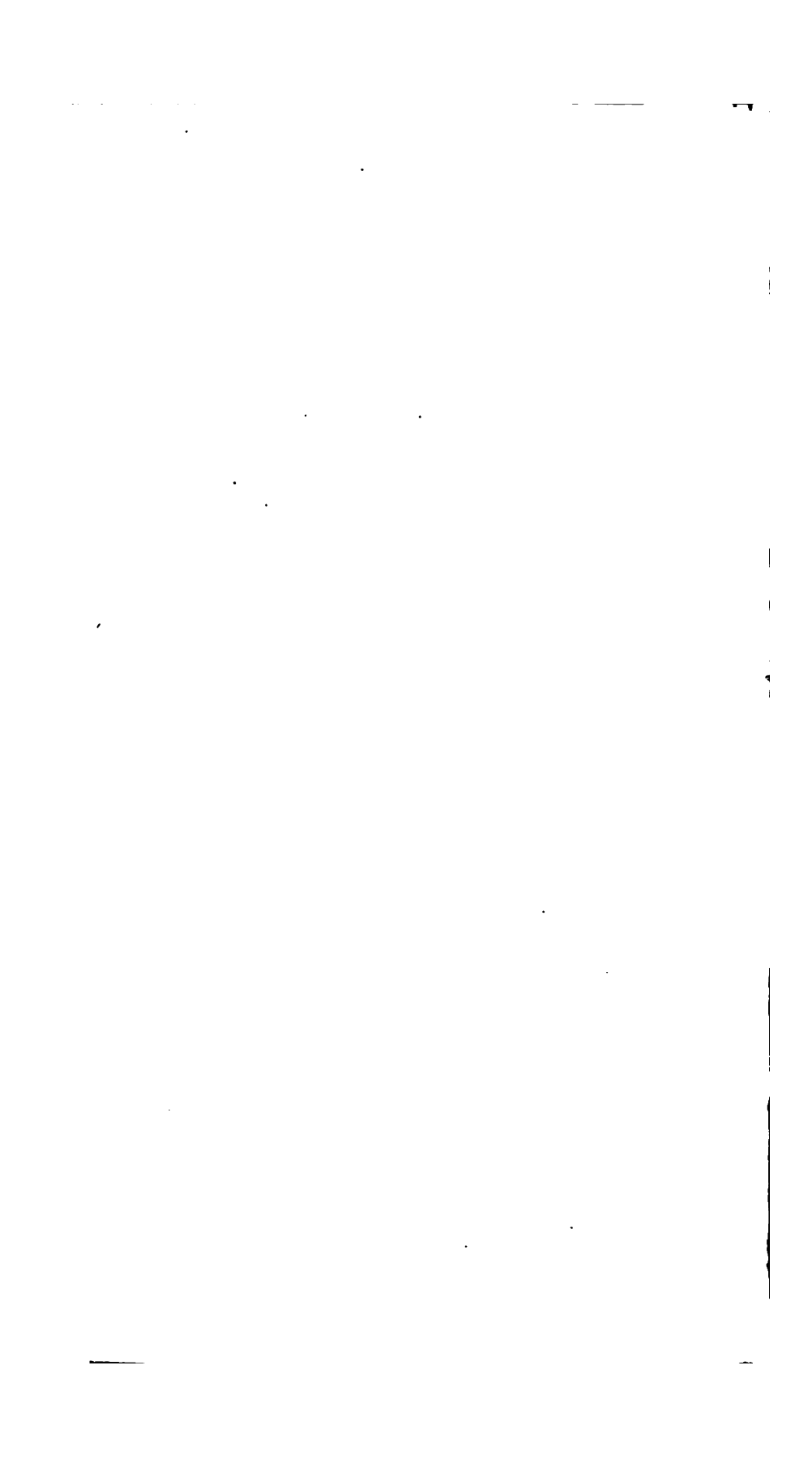
9 and 10
Vict. c. 48.

present Majesty's Reign, intituled *An Act to indemnify Persons connected with Art Unions and others against certain Penalties*, which Act was continued by another Act passed in the Ninth Year of Her present Majesty's Reign : And whereas another Act was passed in the Tenth Year of Her present Majesty's Reign, intituled *An Act for legalizing Art Unions* : And whereas certain Parties have formed themselves into a voluntary Association for the Purpose of encouraging the Application of High Art to the Production of Works of Utility and Ornament, with reference to the said last-recited Act, by means of the Purchase of Works of *British* and Foreign Manufacture, to be afterwards allotted and distributed by Chance or otherwise as Prizes among the several Members, Subscribers, or Contributors forming Part of such said Association : And whereas Doubts have been entertained whether the said Association is a lawful Association within the Sense and Meaning of the said last-recited Act : And whereas it is expedient that all Members of and Subscribers and Contributors to the voluntary Association, and all Persons acting under the Authority or on the Behalf of the same, shall be discharged and protected from any Pains and Penalties to which they may have rendered themselves liable or may render themselves liable by reason of any such their Proceedings as aforesaid : Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

The said Association, and the Members, Subscribers, and Contributors thereof, discharged from Suits and Penalties.

I. The said Association now constituted, and the Members of and Subscribers and Contributors to the said Association, and all Persons who may have acted or may hereafter act under the Authority or on the Behalf of the same, shall be freed and discharged from all Pains and Penalties, Suits, Prosecutions, and Liabilities to which by Law they are or may be liable as having been concerned in illegal Lotteries, Little Goes, or unlawful Games, by reason of anything done or which may have been or may be done by them or any of them herebefore or before the Thirty-first Day of *August* in the Year next ensuing the passing of this Act, in furtherance of the Allotment or Distribution by Chance, Scheme, or otherwise of Articles of the Description herein-before set forth, selected, allotted, and distributed as aforesaid.





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